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No. _____ OFFICE OF THE CLERK

In the Supreme Court of the United States

UNIVERSITY OF CINCINNATI, *et al.*, Petitioners,

v.

JOHN B. JOHNSON, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent served as the senior personnel officer for a public university and claims that he was dismissed because he advocated more vigorous implementation of the university's affirmative action policies. This petition presents three questions arising from this claim:

I.

Whether the First Amendment prohibits a government agency from discharging a senior officer, who reports directly to the agency's head, on the ground that the officer questioned the agency's commitment to its own policies.

II.

Whether Title VII or Section 1981 prohibits the discharge of an employee for advocating that the employer increase its efforts at affirmative action.[1]

III.

Whether it is unlawful retaliation under section 704 of Title VII to dismiss a senior personnel officer who files a charge that the employer violated Title VII by undermining the officer's efforts to promote affirmative action.

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[1] "Title VII" and "Section 1981" are, respectively, the common terms for Title VII of the Civil Rights Act of 1964 and section one of the Civil Rights Act of 1866, which is codified at 42 U.S.C. § 1981. *See* pages 1-2, *infra*.

PARTIES

John B. Johnson was the plaintiff in the district court, was the appellant in the court of appeals, and is respondent here.

The three petitioners here, who were defendants in the district court and appellees in the court of appeals, are: the University of Cincinnati; its President, Dr. Joseph A. Steger; and its Senior Vice-President and Provost for Health Affairs, Dr. Donald C. Harrison.

The University of Cincinnati is an instrumentality of the State of Ohio.

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The Attorney General of Ohio—on behalf of the University of Cincinnati; its President, Dr. Joseph A. Steger; and its Senior Vice-President and Provost for Health Affairs, Dr. Donald C. Harrison—respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-53a) is reported at 215 F.3d 561. The opinion of the district court (App. 55a-89a) is unreported.

JURISDICTION

The judgment of the court of appeals was issued on June 1, 2000, and rehearing was denied on August 9, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits States from "abridging the freedom of speech."

2. Section one of the Civil Rights Act of 1866, codified at 42 U.S.C. § 1981, and commonly referred to as "Section 1981," provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains,

penalties, taxes, licenses, and exactions of every kind, and to no other."

3. Section 703 of the Civil Rights Act of 1964, Title VII, codified at 42 U.S.C. § 2000e-2(a)(1), provides: "It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

4. Section 704 of Title VII, codified at 42 U.S.C. § 2000e-3(a), provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

STATEMENT

This case raises important questions concerning the ability of a government agency to dismiss a senior officer, who reports directly to the agency's head, when the officer expresses his view that the agency is not fulfilling its own policy commitments. A divided panel of the court of appeals has held that, if a public university dismisses a senior official for disagreeing with the university and its president concerning implementation of its affirmative action policy, the dismissal violates the First Amendment as well as Title VII and Section 1981. That holding is contrary to the decisions of other courts of appeals, and, if left unreviewed, will impede the effective management of public agencies generally (and also private employers under Title VII and Section 1981).

1. Background.

The University of Cincinnati (a public institution) maintains an affirmative action program. In 1993, the University appointed respondent John B. Johnson to serve as Vice-President of Human Resources and Human Relations, a position that included responsibility for implementing the University's affirmative action policies. Johnson reported directly to the University's President and served on the President's cabinet.

In 1996, the University discharged Johnson from his position. The parties dispute the reason. The University maintains that it discharged Johnson because of his inability to work effectively with other University administrators, including his improper handling of important labor negotiations. Johnson claims that he was discharged "because of his advocacy on behalf of protected minorities and his support of policies and programs that promoted cultural diversity." Complaint ¶ 1 (App. 90a).

As the case comes to this Court, it is necessary to accept Johnson's allegations as factually accurate. The district court granted summary judgment against Johnson, ruling that his allegations failed to state a claim under Title VII, Section 1981 or the First Amendment. The court of appeals reversed and remanded the case for trial, holding that Johnson's factual allegations, if true, do constitute cognizable federal claims.

2. The District Court Proceedings.

In December 1995, while still serving as the University's senior personnel officer, Johnson filed a formal charge with the EEOC, in which he alleged that he was being obstructed in his efforts to promote affirmative action, especially at the University Hospital. After he was removed from his position in early 1996, he filed this action in federal district court, claiming that he was

dismissed both for his advocacy of increased affirmative action and in retaliation for filing his EEOC charge.

The district court granted summary judgment, dismissing all of Johnson's claims. The district court ruled that, as a matter of law, discharging an employee for advocating an increase in affirmative action is not a violation of either Title VII or Section 1981. App. 73a-74a. As the district court reasoned, because affirmative action is not required by Title VII or Section 1981, the University did not violate either provision. The court explained that, although Johnson "protested when the University failed to hire minorities for the positions of Senior Executive Office[r] for University Hospital and for a University Provost position," Johnson "did not protest that the failure to hire these persons was itself a violation of Title VII." App. 73a.[2]

With regard to Johnson's claim that the University retaliated against him for filing his EEOC charge, the district court explained that Johnson was required to have a "reasonable" belief that the University's conduct to which he objected was unlawful under Title VII, and the facts even as Johnson alleged them would not permit a jury to find that he reasonably believed he was objecting to a Title VII violation. App. 77a-78a. As the district court observed, Johnson was the University's highest-ranking officer in charge of employment matters, with an extensive background in the field. Thus, as a matter of law, it would not have been reasonable for someone in Johnson's position to believe that deficiencies in the implementation of an affirmative action plan amounted to a violation of Title VII itself. App. 79a. Accordingly, the

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[2] In his EEOC charge, Johnson also included a generalized assertion, without details, that his authority was being undermined because of his own race (African-American), but in the district court he abandoned this allegation. As the district court noted, his own race is irrelevant to the claims he makes in this lawsuit. *See* App. 72a, 78a n. 4.

district court ruled that the University was entitled to summary judgment on Johnson's retaliation claim.

The district court also rejected Johnson's First Amendment claim. Applying the analysis articulated in *Pickering v. Board of Education*, 391 U.S. 563 (1968), the district court found that Johnson's criticism of the University regarding affirmative action was a matter of public concern, but went on to declare that it was "causing a tremendous disruption" of the University's operations and thus was unprotected. App. 86a. The district court also observed that difficulties between Johnson and other University administrators, including its President, had reached a point where hiring at the University had become significantly delayed. *See* App. 85a-86a.

3. The Court of Appeals Decision.

The Court of Appeals, in a divided opinion, reversed and remanded for a trial on Johnson's Title VII, Section 1981, and First Amendment claims. The panel majority held that Title VII and Section 1981 both provide a cause of action for an employee who alleges that his employer discharged him for advocating that the employer increase its affirmative action efforts. Given that Title VII and Section 1981 were enacted to protect minorities and women against discrimination, the majority concluded, any workplace advocacy on behalf of these protected groups was itself protected under Title VII and Section 1981. *See* App. 28a.[3]

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[3] The majority pronounced it "clear that a Caucasian high-level affirmative action official could bring a claim under [Title VII and Section 1981] for discrimination based upon his advocacy on behalf of minorities[,] because the discrimination would be 'because of such individual's race,' where the race of the minorities for which he was advocating would be 'imputed' if you will to the Caucasian high-level affirmative action official." App. 22a.

The majority also ruled that Johnson stated a valid retaliation claim by alleging that he was dismissed for filing his EEOC charge. Contrary to the district court, the court of appeals held that Johnson, a high-level personnel officer, reasonably could have believed that he was seeking redress for a Title VII violation when he was protesting perceived deficiencies regarding affirmative action. App. 38a. Accordingly, the court of appeals remanded Johnson's retaliation claim for a determination whether his dismissal was caused by the filing of his EEOC charge.[4]

Finally, the majority reinstated Johnson's First Amendment claim. In its own application of the *Pickering* analysis, the majority rejected the district court's determination that Johnson's advocacy concerning affirmative action was necessarily disruptive to the University. App. 42a. "Even if Plaintiff's speech delayed the University's hiring of prospective employees, this does not rise to the level of having a detrimental impact on close working relationships or undermining a goal or mission of the University." App. 45a. Then the majority expressed its belief that Johnson's advocacy actually "promoted or advanced the University's alleged goal of employment equality for women and minorities [and] did not undermine that goal." *Id.*

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[4] Johnson's retaliation claim is based on Section 704 of Title VII, whereas his "advocacy" claim is based on section 703. His retaliation claim is further divided into two analytically distinct subclaims: first, an "opposition" subclaim insofar as Johnson claims retaliation for opposing what he perceived as insufficient affirmative action; and second, a "participation" subclaim insofar as he claims retaliation specifically for filing his EEOC charge. The court of appeals reinstated the "opposition" subclaim based on its view that protesting perceived deficiencies in affirmative action counts as protected "opposition" under section 704. App. 34a. (By contrast, the district court had rejected Johnson's "opposition" subclaim for the same reason it had rejected his "advocacy" claim under section 703. App. 76a.)

In her partial dissent, Judge Kennedy objected that the majority's analysis of Johnson's "advocacy" claims under Title VII and Section 1981 was "fundamentally flawed." App. 50a. She observed that "[p]laintiff's claim against the University and its employees basically boils down to a disagreement over the implementation of an affirmative action program." App. 50a. She stressed that the majority missed the key distinction between this case and one in which an employee is disciplined for "advocating upon the behalf of a specific individual or specific individuals whose constitutional rights or Title VII rights have been violated." *Id.*

Thus, Judge Kennedy would have affirmed summary judgment against Johnson on his "advocacy" claims under Title VII and Section 1981. Judge Kennedy, however, agreed with the majority that Johnson's retaliation claim should be remanded for trial insofar as it alleges that he was dismissed for filing the EEOC charge. Without specifically considering the predicate question whether Johnson had a "reasonable" belief that the University was violating Title VII, Judge Kennedy favored a liberal construction of the participation clause of section 704 and noted that "his termination occurred in close proximity to his filing of an EEOC claim." App. 51a-52a.

In her dissent regarding Johnson's First Amendment claim, Judge Kennedy reasoned that the *Pickering* analysis must take into account those situations where, as here, it is the very nature of a high-level public officer's job to speak on matters of public concern. App. 52a-53a. Specifically, when the senior officer for human resources speaks on the topic of affirmative action, in the course of performing the duties for which he was hired, the University is entitled to expect that his speech will be consistent with the its own views, as formulated by its President and Board of Trustees. Therefore, Judge Kennedy would have affirmed

summary judgment on the First Amendment claim as well.[5]

REASONS FOR GRANTING THE PETITION

In this petition, we present three questions for the Court's review. One concerns the Sixth Circuit's First Amendment holding. The second concerns Johnson's "advocacy" claim under Title VII and Section 1981. The third concerns Johnson's retaliation claim under section 704 of Title VII, specifically as it relates to his EEOC charge. All three questions are worthy of this Court's attention, and we start with the First Amendment question because it is broadest in scope and presents the most well-developed conflict among the courts of appeals.

I. This Court should settle the circuit conflict concerning what First Amendment test applies when a public agency dismisses a high-level official for expressing a disagreement on a policy matter.

A. This Court's precedents have left this important First Amendment issue unresolved.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court adopted a balancing test for determining whether the First Amendment is violated if a government employee is dismissed because of something

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[5] Johnson's complaint also included pendent state law claims, which the district court in its discretion declined to consider. The court of appeals, however, revived the state law claims based on Ohio's analogue to Title VII. *See* App. 14a n. 4. If this Court grants certiorari and reverses the Sixth Circuit's interpretation of Title VII, then on remand the district court's dismissal of these analogous state-law claims may be reinstated.

the employee has said. The *Pickering* test calls for a case-by-case weighing of an employee's interest in speaking on "matters of public concern" against the government employer's interest in maintaining "efficiency" in its operations. *Id.* at 568. As subsequently refined, the requirement that the employee's speech address a topic of public concern is a threshold inquiry, but once this threshold is met, each case under *Pickering* requires a particularized balancing of the competing interests at stake. *See Connick v. Myers*, 461 U.S. 138 (1983); *see also Rankin v. McPherson*, 483 U.S. 378 (1987).

In *Pickering* itself, as well as in subsequent cases, the Court has suggested that particularized balancing may not be necessary when a high-level officer, or other confidential employee, is dismissed for speech that the agency deems inconsistent with the successful operation of its mission. *See Pickering*, 391 U.S. at 570 n. 3 (where "relationship between superior and subordinate" is sufficiently "personal and intimate," the relationship may become untenable if the subordinate persists in criticizing the superior). *See also Connick*, 461 U.S. at 151-52 ("When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."). Instead, when a high-level officer criticizes the policies or priorities of the agency for which he works, the agency should be permitted to dismiss the officer without judicial second-guessing. Putting this common-sense point vividly, "though a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing." *Waters v. Churchill*, 511 U.S. 661, 672 (1994) (plurality).

Branti v. Finkel, 445 U.S. 507 (1980), supports this point. There, the Court confirmed that individuals serving in some kinds of high-level or confidential public positions may be dismissed solely because of their

political affiliation. As the Court has described this proposition of First Amendment law, "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti,* 445 U.S. at 518. Although some case-by-case balancing may be necessary to determine whether a particular position is indeed an "appropriate" one for a requirement of party affiliation, once that determination is made there is no further balancing of the employee's First Amendment interests against the government's interest in effective administration. In *Branti* the Court invoked the same example of a State's governor to make clear that the governor may insist that his top aides share his political affiliation, without any judicial review of the strength of the governor's interests in a particular case. *Id.* ("[T]he Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments.")

In its *Pickering* line of cases, this Court never has had occasion to decide definitively whether the categorical rule adopted in *Branti* applies when a high-level or confidential employee is dismissed, not for political affiliation, but instead for criticizing his public employer's policies or priorities. *Pickering* involved a teacher, *Waters* a nurse, and *Rankin* a clerical employee. *Connick* involved an assistant district attorney, which might be a position that falls within the *Branti* category (*see* 445 U.S. at 519 n. 13), but the Court did not need to address that question, because the speech for which she was dismissed largely did not involve a matter of public concern and the

little that did clearly threatened to undermine office relations. *See* 461 U.S. at 152-54.[6]

Thus, this case presents an important question of First Amendment law that has remained undecided since *Pickering*.

B. The circuits are sharply divided on the application of *Pickering* to high-level public officials.

The federal courts of appeals are deeply divided concerning the proper test to apply in a case like this one, where a high-level or confidential public employee is dismissed for criticizing the agency's implementation of its own policies. The D.C., First, Seventh, and Ninth Circuits have all held, relying on *Branti*, that there should be no particularized balancing of competing interests once it is determined that the public employee

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[6] In *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), this Court remanded the case to the court of appeals to decide whether *Branti* or *Pickering* should apply when a city refuses to do further business with an independent contractor because the contractor supported the mayor's opponent in a recent election. The purpose of this remand, however, was to leave open the possibility that the city might prevail under a *Pickering* balance. Since an independent contractor would not qualify as a high-level or confidential employee for which a political affiliation requirement would be "appropriate," application of *Branti* in that case would result automatically in a finding of a First Amendment violation. The case-by-case balancing of *Pickering*, by contrast, would permit consideration of the need to accord "government the discretion it requires in the administration and awarding of contracts over the whole range of public works and the delivery of government services." *Id.* at 719-720. Thus, *O'Hare* did not involve the First Amendment question presented here, which concerns the proper analysis in a case involving a high-level officer.

who has criticized the agency is properly identified as holding a policy-level position. *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988); *Flynn v. City of Boston*, 140 F.3d 42, 47 (1st Cir.), *cert. denied*, 525 U.S. 961 (1998); *Warzon v. Drew*, 60 F.3d 1234 (7th Cir. 1995); *Weisbuch v. County of Los Angeles*, 119 F.3d 778 (9th Cir. 1997). By contrast, the Second, Fifth, and Tenth Circuits have all held the opposite: that, although an employee's high-level or confidential position is a factor to be considered when conducting the *Pickering* balancing test, case-by-case consideration still must be given to the strength of the employee's interest in criticizing the agency. *Lewis v. Cowen*, 165 F.3d 154, 162 (2d Cir.), *cert. denied*, 120 S.Ct. 70 (1999); *Kinsey v. Salado Independent School Dist.*, 950 F.2d 938 (5th Cir. 1992) (en banc); *Curtis v. Oklahoma City Public Schools Bd. of Educ.*, 147 F.3d 1200, 1213-14 (10th Cir. 1998).

In a leading case with facts very similar to this one, the D.C. Circuit ruled that the athletic director of a public university could not state a First Amendment claim on the ground that he was dismissed because he expressed the view that the university's athletic department was not in compliance with NCAA rules concerning student-athletes. *Hall*, 856 F.2d at 264. Invoking *Branti*, the court announced a general rule that an employee with responsibility for making or implementing policy may be dismissed for expressing a disagreement with his employer concerning the policies for which he is responsible. *See id.* As the court explained:

> "High-level officials must be permitted to accomplish their organizational objectives through key deputies who are loyal, cooperative, willing to carry out their superiors' policies, and perceived by the public as sharing their superiors' aims; this is true whether or not those officials are elected."

Id. at 263.

Applying this rule, the D.C. Circuit determined that the position of athletic director qualified as a "prominent policy level official," from whom the university's president and board could insist upon loyalty and agreement on policy matters. *Id.* The athletic director reported directly to the university's president and board, "and they were his only superiors." *Id.* at 265. Consequently, because the athletic director's views concerning "how the department should have been run were obviously at odds with those of the Board," this individual could be dismissed for expressing these views, without further First Amendment inquiry. *Id.*

Specifically citing *Hall* and its reliance on *Branti*, the First Circuit has adopted the same rule of First Amendment law. *Flynn*, 140 F.3d at 47 ("[W]here the employee is subject to discharge for political reasons under [*Branti*], a superior may also—without offending the First Amendment's free speech guarantee—consider the official's substantive views on agency matters in deciding whether to retain the official in a policy related position."). That case, also factually similar to this one, involved two associate directors of a city's social services agency, both of whom alleged that they were discharged for protesting various personnel-related matters within the agency. Both of these officials reported directly to the agency's executive director, and both were part of the agency's "top management" responsible for making and implementing the agency's policies. One was associate director for administration and finance and, like Johnson here, specifically had "authority over human resource issues." *Id.* at 45. (The other was associate director for field operations.)

Because both allegedly were dismissed for their speech "relat[ing] to the operation of the office (primarily to matters of hiring, firing and discipline)," their dismissal from these senior management positions was unprotected even if their speech might qualify as a "matter[ ] of public concern" under *Pickering* and *Connick*.

Id. at 47. Given the job-related nature of their speech, the agency's executive director (without further First Amendment balancing) "was permitted to conclude reasonably that she did not have the necessary trust and confidence to retain them." *Id.*[7] Thus, the First Circuit's decision in *Flynn*, like the D.C. Circuit's in *Hall*, is flatly inconsistent with the Sixth Circuit's decision in this case. *See also Warzon*, 60 F.3d at 1239 (7th Cir.) (dismissal of county comptroller for criticizing county's health care plan did not violate the First Amendment because comptroller was a policymaker with specific responsibility for administering this plan);[8] *Weisbuch*, 119 F.3d at 783 (9th Cir.) (demotion of county's medical director for disagreeing with health department's policies on managed care was permissible because this disagreement, from a high-level employee, necessarily would impair department head's confidence).[9]

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[7] Judge Gibson, sitting by designation, disagreed with the First Circuit majority and would have remanded the case for an application of the particularized balancing test under *Pickering* and *Connick*, so that the dismissed associate directors could attempt to show that their interest in expressing their views outweighed the agency's interests in efficient administration of the office. *Id.* at 51.

[8] *Accord Ryan v. Illinois Dept. of Children and Family Serv.*, 185 F.3d 751, 759 (7th Cir. 1999) (applying same categorical rule to dismissal of administrators for criticism of their agency's policies).

[9] Moreover, in a case with facts noticeably similar to this one, the Ninth Circuit rejected the First Amendment claim of the affirmative action officer at a local community college who alleged that she was dismissed because she criticized the college's affirmative action program. *Nelson v. Pima Community College*, 83 F.3d 1075 (9th Cir. 1996). Affirming summary judgment against the plaintiff, the Ninth Circuit explained that it necessarily is insubordination when a college's affirmative action officer, who reports directly to the college's president, disobeys the president's directives concerning

Conversely, the Second, Fifth, and Tenth Circuits, like the Sixth Circuit here, have applied particularized balancing to challenges by policymaking employees claiming to suffer adverse employment action because of policy disputes with their superiors. Expressly rejecting a *Branti*-like categorical rule for this context, the Second Circuit has declared that "a policymaking employee may be discharged on the basis of political affiliation," but the "same employee may not be discharged on the basis of specific speech on a matter of public concern unless the *Pickering* balancing test favors the government employer." *Lewis v. Cowen*, 165 F.3d at 162 (head of state lottery dismissed for policy dispute concerning lottery size).[10] *See also Kinsey*, 950 F.2d at 994-96 (5th Cir.) (applying *Pickering* balancing test to dismissal of school superintendent);[11] *Curtis*, 147 F.3d at 1213-14 (10th Cir.) (sustaining, in part, the First Amendment claim of a school district's "Equity/Affirmative Action Officer" who disagreed with the district concerning the specific emphasis of its equity efforts).[12]

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affirmative action. *Id.* at 1081. *Accord Hamm v. Board of Regents*, 708 F.2d 647, 653 (11th Cir. 1983).

[10] Judge Weinstein (sitting by designation), however, would have applied the *Branti* rule, so as to avoid inappropriate judicial scrutiny of policy disputes within the upper ranks of a public agency. *Id.* at 168-169 (separate concurrence).

[11] *But see id.* at 998 (Higginbotham, with Politz, Garwood and Davis, J.J., concurring specially):

> "When . . . a policymaker is fired because of views related to his mission, there is no further weighing, whether or not these views have been publicly espoused. In a practical sense, the balances have already been struck by the categorization of a worker as a policymaker."

[12] *See also Barker v. City of Del City*, 215 F.3d 1134 (10th Cir. 2000) (applying *Pickering*, rather than *Branti*, to the dismissal of a "confidential" administrative assistant who spoke to a reporter about official matters, and ruling the dismissal unjustified under *Pickering*).

As we next explain, this application of case-by-case balancing to senior-level policy disputes is judicial supervision of management decisions, which seriously intrudes on the ability of an agency to exercise its own judgment in making policy choices.

C. Resolution of this circuit conflict is necessary to uphold the authority of public agencies to dismiss senior administrators who disagree with their agencies on policy matters.

In this case, the majority of the Sixth Circuit panel rejected the University's argument (which had been accepted by the district court) that it was inherently disruptive to have the University's senior personnel officer disagreeing with the President over how best to implement the University's affirmative action plan. The panel majority instead said this criticism would actually help the University achieve its goal of improving opportunities for minorities and women. App. 45a-46a. But in so stating, the panel majority impermissibly substituted its judgment for that of the University's President and Board.

The University was entitled to believe that its interests would be better served by having its affirmative action plan implemented in a manner that was sufficiently flexible to accommodate other important University objectives, including timely hiring of top candidates to fill crucial vacancies at the University's hospital. Once the University perceived that its chief personnel officer was interfering with these objectives by questioning its commitment to affirmative action, the University was entitled to replace its chief personnel officer with someone who would more readily support the University's own views. The University, moreover, was entitled to make this administrative judgment without judicial second-guessing of the kind that occurred in the

Sixth Circuit here. Simply put, the First Amendment should not be construed to stand in the way of a public agency that replaces a senior officer because the officer has criticized the agency as deficient in the implementation of its policies.[13]

II. This Court should review the Sixth Circuit's holding, inconsistent with circuit law elsewhere, that federal legislation protects workplace advocacy of affirmative action.

A. Section 703 of Title VII prohibits employment-related discrimination against any individual "because of such individual's race." Section 704 of Title VII prohibits discrimination against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter." Thus, it is a violation of Title VII to discriminate against an employee because he has opposed an employer's hiring decisions that are themselves discriminatory under section 703. For example, if a white airline pilot is fired because he complains that the airline refuses to hire black pilots, the white pilot would have a valid claim under the opposition clause of section 704 of Title VII.

An employer's failure to adopt an affirmative action plan, however, is not a violation of Title VII, and neither is the failure to implement an existing plan as vigorously as some might like. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981)

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[13] Although this case involves only internal criticism of a public agency by one of its top officials—and some circuit courts, as well as Judge Kennedy in dissent here, have considered this fact significant—the rule we would urge the Court to adopt would encompass both internal and public criticism of an agency by a senior official. In this respect, our proposed rule would encompass the case of the governor's deputy who speaks publicly in criticism of the governor's policies. *See Waters*, 511 U.S. at 672 (discussed, *supra*, at p. 9).

("Title VII, however, does not demand that an employer give preferential treatment to minorities or women.").[14] Thus, opposing an employer's deficiencies in affirmative action is not opposing an "unlawful" practice under Title VII, and for this reason dismissing an employee for protesting deficiencies in affirmative action is not an actionable offense under the opposition clause of section 704. Nor, quite obviously, is dismissing an individual for advocating affirmative action a form of discrimination against *either* that particular individual *or* any other individual "because of such individual's race" within the meaning of section 703 of Title VII.

B. Section 1981 is no more hospitable to Johnson's advocacy claim. This provision, first adopted as section one of the Civil Rights Act of 1866, guarantees blacks and whites "the same right . . . to make and enforce contracts." It, too, does not require affirmative action. *Cf. Patterson v. McLean Credit Union,* 491 U.S. 164 (1989).

Johnson argued, and the Sixth Circuit agreed, that this Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), supports holding employers liable under Section 1981 if they adversely treat an employee for advocating affirmative action. But that contention is incorrect. *Sullivan* permitted a white landowner to sue under the Civil Rights Act of 1866

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[14] Indeed, Title VII specifically so states:

> "Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

42 U.S.C. § 2000e-2(j).

(Section 1982 specifically) because he was expelled from a racially restrictive property owners' association after attempting to assign his interest in the property to an African-American. In that case, the racial restriction that the white owner was protesting was clearly prohibited by the Civil Rights Act, and thus it made sense to grant the white owner standing to remedy this violation of the statute. But there is simply no suggestion from this Court, in *Sullivan* or elsewhere, that such third-party standing would extend to cases where the plaintiff does not claim that anyone has suffered a civil rights violation. Thus, protesting a deficiency in affirmation action, which is not a statutory violation, cannot give rise to the kind of derivative standing recognized in *Sullivan*.[15]

C. In this lawsuit, as the district court specifically observed (*see, supra*, p. 4), Johnson does not allege that any of the University's conduct he opposed was a violation of Title VII or Section 1981. The "preliminary statement" of his complaint says that Johnson suffered "because of his advocacy on behalf of protected minorities and his support of policies and programs that promoted cultural diversity." App. 90a.[16]

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[15] In addition to *Sullivan*, the Sixth Circuit cited several circuit cases to sustain Johnson's "advocacy" claim under Title VII and Section 1981. *See* App. 19a-21a. But all of these cases, like *Sullivan*, are inapposite because they all involved racial discrimination itself, not a lack of affirmative action. *See, e.g., Tetro v. Popham*, 173 F.3d 988, 994 (6th Cir. 1999) (discrimination against father of biracial child).

[16] Throughout the complaint, there is repeated reference to the self-described "battle" that Johnson undertook "in connection with the implementation and enforcement of affirmative-action policies and practices." App. 97a. The complaint also contains some generalized allegations that Johnson opposed "disparities in hiring and pay for minority employees," App. 92a, but nowhere is there a claim that these disparities amounted to a Title VII violation. Instead, summing up the essence of Johnson's case, the complaint states that the University's President ultimately turned against Johnson for "attempting to

And Johnson's brief to the district court opposing summary judgment states:

> "This case stems from Mr. Johnson's efforts to vindicate the university's official affirmative-action polices as required by federal regulation of the Office of Federal Contract Compliance and Programs (OFCCP). Mr. Johnson was a forceful and vocal proponent of these policies. Nevertheless, Mr. Johnson was prevented from fulfilling his responsibility with respect to these policies when the university's administration effectively marginalized his authority. In response, Mr. Johnson filed a complaint of discrimination with the [EEOC]."

App. 106a-107a. Given this description of his own case, from the plaintiff himself, it should be evident that the district court was correct to grant summary judgment, as a matter of law, dismissing Johnson's "advocacy" claims under Title VII and Section 1981—and the court of appeals was wrong to reverse.[17]

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gain University's compliance with affirmative-action policies." App. 98a.

[17] In a footnote, the Sixth Circuit cited Johnson's deposition testimony that the University's President had told him in a meeting, "Faculty would kill me if I would bring in a black provost, particularly with us already having two black vice presidents at the University." App. 28a n. 7. While the University's President disputes Johnson's account of this conversation, the important point here is that Johnson has never alleged that the University or its President engaged in a Title VII violation in hiring a new provost (or otherwise). Nor, indeed, does Johnson's complaint even mention the hiring of a new provost, focusing instead on the alleged deficiencies in affirmative action at the University Hospital. Accordingly, this case comes to this Court predicated on the claim that it is enough, for purposes of Title VII and Section 1981, that Johnson opposed hiring practices that he believed were inadequate in promoting affirmative action. In seeking

D. It is important, furthermore, that this Court grant certiorari in this case to repudiate the Sixth Circuit's clearly erroneous interpretation of Title VII and Section 1981. The Sixth Circuit has effectively converted these historic civil rights statutes into a new form of free speech provision, one applicable to the private as well as public sector, and one that grants employees absolute immunity from discipline in response to speech concerning race or gender issues in the workplace. The private-sector speech protected by the Sixth Circuit's new rule, moreover, necessarily includes speech advocating *less* affirmative action (since this worker might be sticking up for co-workers who he believes are suffering from reverse discrimination). Presumably, the Sixth Circuit rule would also encompass workplace speech advocating that the employer provide more child care or family leave or "flex-time" scheduling, since such policies are often viewed as especially benefiting women in the workplace. Although there might be some policy considerations in favor of a federal law that protects this kind of private-sector speech, Congress did not enact such a law in either 1866 or 1964. The Sixth Circuit should not be permitted to rewrite either Civil Rights Act merely to conform to that court's own policy preferences regarding workplace advocacy of affirmative action.

The potential ramifications of the Sixth Circuit's decision here are even broader, considering that Title VII is a model for many other federal anti-discrimination statutes, including the Americans with Disabilities Act. *See McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357-358 (1995). Thus, given the Sixth Circuit's decision here, it follows that a corporation's senior personnel officer may not be dismissed for urging the corporation to adopt greater accommodations for the disabled than those the ADA itself requires. Unlike the Sixth Circuit, however, the First Circuit wisely has

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certiorari on this issue, we ask this Court to review (and ultimately reject) this claim.

rejected such a view. *See Oliveras-Sifre v. Puerto Rico Dept. of Health*, 214 F.3d 23, 27 (1st Cir. 2000).

The Sixth Circuit's expansion of liability under Title VII and Section 1981 also stands in stark contrast to the Eighth Circuit's decision in *Evans v. Kansas City, Mo. Sch. Dist.*, 65 F.3d 98 (8th Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996). In *Evans*, a school teacher sued under both Title VII and Section 1981, claiming that he was terminated from his position because he voiced his view that the school's implementation of a magnet program pursuant to a desegregation decree was inadequate in meeting the needs of the school's minority students. The Eighth Circuit, however, ordered dismissal of the plaintiff's claim on the ground that his allegation did not state a valid claim under either Title VII or Section 1981. As the Eighth Circuit put it, "Title VII is not a 'bad acts' statute" and thus does not protect protestations about school policies that do not involve "any allegation of a discriminatory employment practice." *Id.* at 101. The same point, the court added, applies to Section 1981. *Id. See also Jamil v. Secretary of Defense*, 910 F.2d 1203, 1207 (4th Cir. 1990) (opposing employer conduct that does not itself violate Title VII is not protected); *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978) ("opposition must be directed at an unlawful employment practice of an employer," not at a co-worker's racial slur); *accord Little v. United Technologies,* 103 F.3d 956 (11th Cir. 1997).

This Court should grant certiorari here to settle the scope of protected "advocacy" under Title VII and Section 1981, as well as to resolve the circuit conflict concerning *Pickering* and policymakers.

III. This Court should resolve whether an EEOC charge by a senior personnel officer must be reasonable and, if so, whether it is unreasonable to charge that an employer violates Title VII by undermining efforts at affirmative action.

The "participation" clause of section 704 of Title VII makes it unlawful to retaliate against an employee for filing a charge or otherwise participating in an EEOC proceeding. There is no doubt that an employee may maintain a valid "participation" claim even if it turns out that he was mistaken in believing that a Title VII violation occurred. The courts of appeals, however, have divided on the question whether the employee's mistake must be reasonable and in good faith.[18] This Court has yet to address the issue.[19]

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[18] Some circuits have said that employees are protected under section 704 even for filing baseless or malicious EEOC charges, while others have rejected this view. Compare, for example, *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994) (reasonableness not required); and *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969) (maliciousness in EEOC charge not sufficient to justify dismissal); with *Balazs v. Liebenthal*, 32 F.3d 151, 158-160 (4th Cir. 1994) (clearly baseless EEOC charge not protected); *Learned v. City of Bellevue*, 860 F.2d 928, 932-933 (9th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989) (reasonableness required); and *Gupta v. Florida Board of Regents*, 212 F.3d 571, 586-87 (11th Cir. 2000) (reasonableness and good faith required). *See also Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1569 (2d Cir. 1989) (interpreting parallel provision in ADEA to require reasonableness and good faith).

[19] Reasonableness is an objective test, while good faith is subjective. In this case, the district court found Johnson's belief to be both objectively unreasonable and subjectively in bad faith. App. 79a, 83a. Because the district court's determination of unreasonableness is correct as a matter of law and should suffice to permit Johnson's dismissal from his position as Vice

Although this case does not require a resolution of this conflict for all employees, we do petition the Court to consider whether the requirement of reasonableness is appropriate when a senior personnel officer claims that his employer wrongly dismissed him for filing an EEOC charge.[20] An employer who hires a high-level officer for personnel matters, including the specific task of assuring compliance with Title VII and other anti-discrimination laws, is entitled to expect a certain level of competence in this officer's performance of his duties. A senior personnel officer who *unreasonably* believes that his employer has violated Title VII does not satisfy this level of competence.[21] Accordingly, the employer should be permitted to dismiss a senior personnel officer for the specific reason that the officer unreasonably has charged the employer with violating Title VII.[22]

President of Human Resources, there is no need for this Court to consider Johnson's subjective intent in filing his EEOC charge.

[20] The courts of appeals have struggled specifically with section 704 retaliation claims raised by senior personnel officers. *See* R. Bales, *A New Standard for Title VII Opposition Cases: Fitting the Personnel Manager Double Standard into a Cognizable Framework*, 35 S. Tex. L. Rev. 95, 124-136 (1994).

[21] *Cf. Amos v. Housing Auth. of the Birmingham District*, 927 F.Supp. 416, 422 (N.D. Ala. 1996) (upholding termination of EEO staff member for filing a baseless age discrimination claim because, in light of employee's extensive training and experience in EEO matters, she could not have reasonably believed that her claim had merit).

[22] Some courts of appeals have held that the inherent act of a personnel officer filing an EEOC charge against the employer is a "conflict of interest," justifying dismissal, given that it is specific duty of this particular position to represent the employer on EEOC-related matters. *See Smith v. Singer Co.*, 650 F.2d 214, 216-217 (9th Cir. 1981); *Pendleton v. Rumsfeld*, 628 F.2d 102, 108 (D.C. Cir. 1980). *See also Jones v. Flagship International*, 793 F.2d 714, 726 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) (suggesting that such a conflict of interest may justify termination). This view, however, arguably might

Applying this reasonableness standard here, it is evident that Johnson did *not* act reasonably in charging that the University had violated Title VII by diminishing his influence because he advocated greater efforts at affirmative action. As the University's senior personnel officer, with supervisory authority over all employment-related matters (including Title VII compliance), Johnson should have known that deficiencies regarding affirmative action were not themselves violations of Title VII. Thus, Johnson also should have known that he was not opposing Title VII violations when he was protesting what he saw as non-compliance regarding affirmative action. For this reason, the proper disposition of Johnson's "participation" claim is to hold (as the district court did) that his EEOC filing was unreasonable as a matter of law and, therefore, a legitimate ground for terminating him as the University's senior personnel officer.

The Sixth Circuit's contrary determination (that Johnson "could have reasonably believed that he had a viable discrimination claim on the basis of his advocacy right as an affirmative action representative," App. 38a) is especially pernicious. This Court, therefore, should grant certiorari on this issue to forestall the mischief that the Sixth Circuit's decision otherwise will cause. If employers may not dismiss senior personnel officers who unreasonably believe that deficiencies in affirmative action violate Title VII, then employers will face an inappropriate incentive to curtail affirmative action in the first place. Upon hiring personnel officers, employers may be tempted to say that they want no advocacy from

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go too far (since it would deprive a senior personnel officer of the right to file even a reasonable charge on his own behalf), and in any event is unnecessary to a proper resolution of this case. As long as an employer may dismiss a senior personnel officer for acting unreasonably (as Johnson's EEOC charge certainly was, for the reasons we next explain), an employer's legitimate interests are adequately protected.

these officers on behalf of affirmative action, and therefore these officers must clearly understand that such advocacy would be insubordination.[23] This perverse incentive neither serves the goals of affirmative action nor is called for by a proper construction of the "participation" clause of Title VII. Instead, a sensible application of the "reasonableness" standard will enable employers to pursue the goals of affirmative action, but at the same time dismiss senior personnel officers who have acted inappropriately in the performance of their duties.[24]

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[23] *Cf. Whatley v. Metro. Atlanta Rapid Transit Authority*, 632 F.2d 1325, 1329 (5th Cir. 1980) (permissible to fire a personnel officer who, among other things, participates in an EEOC proceeding in a way contrary to employer's specific directives).

[24] Furthermore, any standard other than "reasonableness" would raise serious questions of federalism, if state agencies (like the University here) were liable under Title VII for discharging high-level personnel officers who perform unreasonably and thus incompetently. *Cf. Gregory v. Ashcroft*, 501 U.S. 452 (1991). Although we do not present a separate federalism-based question in this petition, this constitutional concern is an additional reason to address the Sixth Circuit's misinterpretation of Title VII.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2000

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No. _____

In the Supreme Court of the United States

UNIVERSITY OF CINCINNATI, *et al.*, Petitioners,

v.

JOHN B. JOHNSON, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-3016

JOHN B. JOHNSON, *Plaintiff-Appellant*,

v.

UNIVERSITY OF CINCINNATI, JOSEPH A. STEGER, AND DONALD C. HARRISON, *Defendants-Appellees.*

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 96-00727—Sandra S. Beckwith, District Judge.

Argued: January 29, 1999
Decided and Filed: June 1, 2000

Before: KENNEDY, DAUGHTREY, and CLAY,
Circuit Judges.

COUNSEL

ARGUED: Marc D. Mezibov, SIRKIN, PINALES, MEZIBOV & SCHWARTZ, Cincinnati, Ohio, for Appellant. John B. Pinney, GRAYDON, HEAD & RITCHEY, Cincinnati, Ohio, for Appellees. **ON BRIEF:** Marc D. Mezibov, SIRKIN, PINALES, MEZIBOV & SCHWARTZ, Cincinnati, Ohio, Ted L. Wills, Cincinnati, Ohio, for Appellant. John B. Pinney, Michael A. Roberts, GRAYDON, HEAD & RITCHEY, Cincinnati, Ohio, for Appellees.

CLAY, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. KENNEDY, J. (pp. 39-44), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge. Plaintiff, John B. Johnson, who is African American, was employed by the University of Cincinnati ("the University") as its Vice President of Human Resources and Human Relations from August 1, 1993 to January 17, 1996, when he was terminated. Central to Plaintiff's role as Vice President of Human Resources was his management of the University's affirmative action program, for which Plaintiff had primary responsibility. Following his termination, Plaintiff filed suit against the University; Dr. Joseph Steger, the University's president; and Dr. Donald Harrison, the University's Senior Vice-President and Provost of University Hospital, alleging that Defendants discriminated against him by removing him from his duties because of Plaintiff's advocacy on behalf of minorities and his filing of an EEOC claim against the University. The district court dismissed or granted summary judgment on all nine counts of Plaintiff's complaint. Plaintiff now appeals the district court's order granting summary judgment to Defendants on his claim for race and national origin discrimination brought under 42 U.S.C. § 1981 and Title VII, 42 U.S.C. § 2000e-2; retaliatory discrimination brought under the opposition and participation clauses of 42 U.S.C. § 2000e-3(a); as well as his claim brought under 42 U.S.C. § 1983 for violation of his right to free speech under the First Amendment. For the reasons set forth below, we **AFFIRM in part**, **REVERSE in part**, and **REMAND** the case back to the district court for trial.

BACKGROUND

A. The University and its Affirmative Action Policy

As a federal contractor, the University is required to meet certain affirmative action obligations. *See* 41 C.F.R. § 60-1.40; Executive Order No. 11246. These obligations consist of, among other things, maintaining and updating affirmative action programs; analyzing the University's workforce by race and sex; analyzing areas of underutilization of women and minorities; maintaining data regarding the employment of women and minorities; and analyzing the impact of the University's employee selection process. *See* 41 C.F.R. § 60-1.40; § 60-2.11(a); § 60-2.11(b); § 60-3.4; § 60-3.15.

In 1978, the Office of Federal Contract Compliance and Programs ("OFCCP") investigated the University and found pay disparities among African Americans and women in the University; the OFCCP therefore concluded that the University was in violation of its affirmative action duties. *See* 41 C.F.R. § 60-1.26. As a result, the University and the OFCCP entered into a Conciliation Agreement wherein the University agreed to implement procedures to prevent discrimination against women and minorities. These procedures consisted of identifying underutilized positions, creating a list of new candidates for new positions, and ensuring that the list included names of qualified women and minorities. If a non-minority male applicant was selected and if women and minorities did not appear on the candidate list, then the employing unit at the University was required to give written reasons for the omissions. The affirmative action office was to approve or disapprove the selected person

after a determination of whether sex or race was a factor in the selection.

In an effort to comply with the mandates of the Conciliation Agreement regarding the University's hiring practice, the University developed a form—known as the A-900 form or A-900 process—that tracked open employment positions. Under this process, the hiring manager of each department wishing to fill a vacant position, no matter how high or low in the organizational structure, was required to complete an A-900 form and submit it to the affirmative action office ("AAO"). In turn, the AAO would inform the hiring manager whether the vacant position was underutilized; meaning whether the position was one that statistically had fewer women and minorities employed than would be expected given the makeup of the overall population.

If the position to be filled was underutilized, the hiring manager was required to advertise the open position, assemble a pool of candidates, select a candidate, and send the information to the AAO. If the selected candidate was not a member of the underutilized class, then the affirmative action director and the hiring manager would consider whether sufficient numbers of members of the underutilized class were considered. The affirmative action director could reject the selected candidate and require the hiring manager to begin a new search. However, Dr. Steger as president of the University, could waive the A-900 process and allow a hiring manager to hire a non-minority candidate, despite the underutilization of minorities within the particular department, and over the objection of the AAO.

Following the expiration of the Conciliation Agreement in 1980, the University's AAO fell into a state

of disarray. In the spring of 1988, Dr. Steger appointed the President's Advisory Council on Race Relations and Human Decency ("PACRRHD") and charged it with examining issues of race relations at the University. The focus of the PACRRHD was to "create a diverse community in which all members feel a sense of responsibility for the elimination of ignorance, suspicion, prejudice and racism." In a report submitted to Dr. Steger on August 4, 1989, the PACRRHD noted that although African Americans occupied 28% of the University's total staff, they occupied the lower employment categories at the University in vastly disproportionate numbers. For example, African Americans occupied 74% of the service staff, 29% of the technical staff, and 33% of the secretarial staff; however, African Americans occupied only 10% of the executive/administrative staff and 11% of the professional/non-faculty staff. Based on these findings, the PACRRHD recommended a new comprehensive affirmative action initiative at the University with specific goals toward increasing the number of minorities in upper level positions. The PACRRHD also recommended the creation of a new high level position to head the affirmative action program. The individual selected for this position would report directly to the president and have Cabinet-level status, and would be responsible for "following current Affirmative Action functions, as well as the development of new programs, policies and diversity initiatives to improve and enhance the quality of life." In response to the PACRRHD's recommendations, the Vice President of Human Resources and Human Relations ("VPHHR") position was created wherein the individual occupying that role would be in charge of both human resources and the affirmative action program.

B. Plaintiff's Role and Course of Employment at the University

In 1993, Dr. Steger recruited Plaintiff to serve as the VPHHR following a national search. Plaintiff signed a three-year contract and began his duties as VPHHR on August 1, 1993. Plaintiff was the second person to occupy this role; and there was a period of time before Plaintiff was appointed that the position was unoccupied and the AAO was without a permanent head. As a result, at the time Plaintiff was brought aboard, the AAO was in state of disorder and flux. There was a backlog of A-900 forms that had accumulated during the time the AAO was without a head, as well as [a] large number of A-900 waivers. For example, there were approximately 300 waivers of the A-900 process from 1992 to May of 1994. Plaintiff expanded the AAO, and hired George Wharton as its director in September of 1994.

Plaintiff was troubled by what he perceived to be the excessive number of waivers of the A-900 process, and in July of 1994, Plaintiff sent a memorandum to the Cabinet members entitled, "Is there an Affirmative Action Commitment?" In the memorandum, Plaintiff expressed his concern about the number of waivers in the A-900 process, questioned the University's commitment to equal employment opportunities, and warned that continued violations could cause the OFCCP to enforce a new conciliation agreement.[1]

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[1] The OFCCP in fact conducted a second audit of the University which was completed on May 26, 1995, and thereafter sent the University a completed audit outlining nine violations. However, over the objections of Plaintiff and Wharton, Dr. Steger retained the services of an outside law firm to respond to

Throughout 1994 and 1995, Plaintiff became particularly concerned with the University's commitment to affirmative action regarding University Hospital's association in the "Alliance," a private, non-profit health care management corporation with a single board of directors created to manage and control four of the major hospitals in the community. By joining the Alliance, the University surrendered daily operation of University Hospital to the health care management group, although those employed there remained employees of the University until January 1, 1997. Despite his requests, Plaintiff was not allowed to play any meaningful role with respect to Alliance, even though the human resource counterparts from the other hospitals involved regularly contributed.

Under the Alliance agreement, the University was required to hire a Senior Executive Officer ("SEO") to run the University Hospital's daily operations. The SEO was to be an Alliance employee who reported directly to the President of the Alliance; however, the University participated in the hiring selection for this position. An outside search firm was hired to facilitate the search. The search firm identified approximately 200 resumes; out of these resumes, three candidates were selected for the final vote: a white male, an African-American male, and a white female. After interviewing all three candidates, Plaintiff cast his vote in favor of the African-American male based on the candidate's overall experience as well as the fact that Plaintiff found him to be the strongest of the three candidates. However, the white male was selected for the SEO position by receiving the majority of votes by the selection committee. At a July 25, 1994

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the notice from the OFCCP rather than allow Plaintiff the opportunity to respond to the violations.

meeting attended by Dr. Harrison and Plaintiff following the SEO selection, it was agreed that Plaintiff would direct the search for the next two executive level positions to become available at the University Hospital, and that efforts would be made to target minorities to fill these positions. Plaintiff sent a memorandum dated July 27, 1994, to Dr. Harrison detailing Plaintiff's understanding of the outcome of the meeting.

In August of 1995, Dr. Harrison sought a waiver of the A-900 process to fill the position of Vice Chairman of the Department of Surgery for the College of Medicine. Specifically, Dr. Harrison requested that he be able to hire Dr. James Hurst, a former member of the College of Medicine faculty, without going through the A-900 process because he knew and endorsed the former member's experience and abilities. Plaintiff sent a letter dated September 21, 1995, to Dr. Steger protesting Dr. Harrison's waiver of the A-900 process and questioning the University's commitment to providing equal opportunities in employment. Despite Plaintiff's protestations, Dr. Steger approved the A-900 waiver at Dr. Harrison's request.

A few months later, in November of 1995, the University was negotiating with District 925 of the Service Employees International Union ("925") and, as VPHHR, Plaintiff participated in the negotiations. District 925 represents the secretarial and support staff of the University. The contract between the University and 925 employees was up for renewal. and the critical issue during the negotiations was tuition remission; that is, the amount of money 925 employees would have to reimburse the University for the cost of tuition waivers granted by the University in the event the employee failed to achieve a certain minimum grade. This issue was the final barrier

to the University and 925 reaching an agreement, and the University was prepared to accept the cost of a strike if 925 did not agree to the University's terms.

Dr. Steger met with Plaintiff and Stephanie Echols, the University's representative at the negotiations, to discuss the status of the 925 matter. There is a dispute as to what transpired at the meeting inasmuch as Dr. Steger contends that the three discussed a proposal from 925, which Dr. Steger rejected; while Plaintiff contends that there was no proposal rejected at the meeting. However, that aside, the parties are in agreement that it was understood that the University would risk a strike rather than comply with the 925 remission demands. At the close of the meeting, Dr. Steger indicated that he had to leave to attend a dinner engagement, but that he could be reached at home later in the evening if developments were made in the 925 negotiations.

Echols negotiated with 925 until late into the evening, repeatedly updating Plaintiff on her progress. According to Echols, each time that she updated Plaintiff, he repeated Dr. Steger's warning that the University would accept a strike rather than concede to tuition remission. Finally, at about 11:30 p.m., Echols tentatively agreed with 925 members on a proposal that she believed would satisfy the University and informed Plaintiff of the proposed settlement. However, according to Plaintiff, he informed Echols at that time that the tentative settlement to which she agreed was not in line with what the University was prepared to accept. Echols replied that the parties had departed, and if the tentative settlement was not acceptable, it could be addressed later.

Due to the late hour—about midnight by this time—Plaintiff decided to wait until the morning to telephone Dr. Steger and inform him of the proposed settlement. Plaintiff telephoned Dr. Steger at his office at approximately 7:00 a.m., the next day; however, Plaintiff did not speak with Dr. Steger because he had already left for a breakfast meeting with the deans of the University. News of the proposed settlement apparently did not escape the news media, because Dr. Steger was informed of the tentative settlement during his breakfast meeting with the deans. Dr. Steger was not pleased that Plaintiff had not reached him with the latest developments, and sent Plaintiff a letter dated November 15, 1995, admonishing Plaintiff while claiming that he "was embarrassed this morning at a breakfast with the Deans when they asked me the terms of the 925 settlement. I had to say I did not know they settled—let alone the terms." (J.A. at 298.)

Because the Board of Trustees was the body to ultimately authorize the 925 settlement, Dr. Steger requested that Plaintiff draft a summary of the settlement for the Board to review at its next meeting on November 28, 1995. The Board reviewed the summary; however, it demanded to see the full text of the agreement before they would approve it, and planned to meet again on December 18, 1995. In the meantime, apparently at Plaintiff's directive, the payroll department began programming its computers to adjust for the pay increases and back pay adjustments that were reflected in the settlement. The payroll department subsequently informed Dr. Steger that the payroll adjustments would be reflected on the December 5, 1995, paychecks despite the Board's lack of final approval because it was not possible to reverse the computer adjustments at that time. Accordingly, Dr. Steger told the payroll department

to issue the checks as adjusted. On December 18, 1995, the Board, unhappy with the terms of the settlement but constrained by the adjustments in the payroll system, accepted the 925 settlement.

Plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") on December 5, 1995, alleging race and retaliatory discrimination against the University. Plaintiff claimed that University officials, particularly Dr. Harrison, were discriminating against him because of his race as an African American, and not allowing him to fully participate in Human Resource matters in regard to University Hospital. Plaintiff also alleged that he was retaliated against for his protestations regarding the hiring of the SEO. On or around December 20, 1995, Dr. Steger informed his Cabinet that Plaintiff had filed a discrimination complaint with the EEOC. Plaintiff met with Dr. Steger on December 20, 1995, in the course of a regularly scheduled meeting, and requested that Dr. Steger provide him with information regarding what role the Human Resource department was to play in managing the personnel affiliated with the Alliance, as well as information regarding the Board's criticisms of Plaintiff's handling of the 925 negotiations. Dr. Steger agreed to provide Plaintiff with this information in writing within a few weeks.

On January 9, 1996, Dr. Steger sent Plaintiff a memorandum outlining what Dr. Steg[e]r found to be deficiencies in Plaintiff's performance as VPHHR, including Plaintiff's handling of the 925 negotiations, as well as complaints that Dr. Steger had allegedly received from other departments regarding the length of time it took Plaintiff to process an A-900 form. Dr. Steger concluded the letter by indicating that he "questioned

[Plaintiff's] continued ability to occupy a leadership position in this University." In response, Plaintiff sent Dr. Steger a memorandum dated January 16, 1996, wherein Plaintiff disputed Dr. Steger's criticisms. Plaintiff also indicated that he was surprised by Dr. Steger's "attack" on his performance since he was hearing about Dr. Steger's dissatisfaction for the first time. In fact, the record indicates that Plaintiff received two written performance evaluations from Dr. Steger; one in July of 1994, and the other about a year later. Although the second evaluation was not as complimentary as the first, Dr. Steger gave Plaintiff high marks for his leadership and vision for the future in both evaluations.

The day after receiving Plaintiff's memorandum, January 17, 1996, Dr. Steger sent Plaintiff a termination notice and removed Plaintiff from his duties. Plaintiff filed the instant suit on July 25, 1996.

DISCUSSION

I. ELEVENTH AMENDMENT IMMUNITY DEFENSE & BARRED CLAIMS

We first address Defendants' Eleventh Amendment immunity defense because this defense raises a question of federal jurisdiction. *See Wilson-Jones v. Caviness*, 99 F.3d 203, 206 (6th Cir. 1996) ("As an Article III restriction, state immunity is jurisdictional in the same sense as the complete diversity requirement, . . . or the well-pleaded complaint rule.") (citations omitted). Regarding Plaintiff's claims brought against Defendants pursuant to 42 U.S.C. § 1981 and § 1983, the University, as an arm of the State, is immune from suit under the Eleventh Amendment because it is well-settled that a plaintiff is precluded from directly suing a State in federal

court on these claims. *See Hafford v. Seidner*, 183 F.3d 506, 512 (6th Cir. 1999) (recognizing that claims against a State under § 1981 are barred by the Eleventh Amendment); *see also Quern v. Jordan*, 440 U.S. 332, 350 (1979) (holding that § 1983 does not override a State's Eleventh Amendment immunity). However, Plaintiff's § 1981 and § 1983 claims against Dr. Steger and Dr. Harrison in their individual capacities are not barred by the Eleventh Amendment.

Plaintiff's claims brought against Dr. Steger and Dr. Harrison in their individual capacities under Title VII cannot go forward, however, because such claims can only proceed against individuals who otherwise qualify as employers, which Plaintiff does not allege.[2] *See Wathen v. General Electric Co.*, 115 F.3d 400, 405 (6th Cir. 1997) ("[A]n individual employee/supervisor who does not otherwise qualify as an 'employer,' may not be held personally liable under Title VII."); *see also Morris v.*

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[2] We note that the Ohio Supreme Court has recently indicated "that for purposes of R. C. Chapter 4112, a supervisor/manager may be held jointly and/or severally liable with her/his employer for discriminatory conduct of the supervisor/manager in violation of R. C. 4112." *See Genaro v. Central Transport, Inc.*, 703 N.E.2d 782, 787-88 (Ohio 1999). Therefore, upon remand, Plaintiff's claim of race discrimination and retaliation brought against Dr. Steger individually under Ohio Rev. Code § 4112.99 may go forward. Because the Ohio court did not establish that a non-supervisor may be individually liable under Chapter 4112, the same does not hold true for Plaintiff's Chapter 4112 claim brought against Dr. Harrison individually. *See Summerville v. Ross/Abbott Labs.*, No. 98-3517, 1999 WL 623786, at **4 (6th Cir. Aug. 10, 1999). Because Plaintiff did not sue Dr. Harrison in his official capacity, Dr. Harrison is relieved of liability under Title VII and Ohio Rev. Code § 4112.

Oldham County Fiscal Court, 201 F.3d 784, 788 n.1 (6th Cir. 2000) (recognizing *Wathen's* holding). Plaintiff's Title VII claims are permissible against the University in federal court notwithstanding the Eleventh Amendment and against Dr. Steger in his official capacity.[3] *See Alden v. Maine,* 527 U.S. 706, 119 S. Ct. 2240, 2266-68 (1999); *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976) (finding that Congress abrogated the States' sovereign immunity by enacting Title VII under the Enforcement Clause, § 5, of the Fourteenth Amendment).

In summary, Plaintiff is allowed to proceed with his claims brought under Title VII against the University and Dr. Steger in his official capacity; and he is allowed to proceed with his claims brought under § 1981 and § 1983 against Dr. Steger and Dr. Harrison in their individual capacities.[4] These claims will be addressed in turn as follows.

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[3] Plaintiff sued Dr. Steger in his individual capacity with respect to damages, and in his official capacity with respect to Plaintiff's claim for equitable injunctive relief. However, because Plaintiff now has a new job with similar pay and benefits, the equitable relief may no longer remain at issue, and Plaintiff now seeks money damages. Furthermore, Dr. Steger claims that he has no authority to grant Plaintiff equitable relief and that he should be dismissed from suit. We leave these issues for the district court to resolve on remand.

[4] Our holdings as to Plaintiff's claims brought under Title VII apply with equal force to his claims brought under Ohio Rev. Code § 4112. *See Little Forest Med. Ctr. of Akron v. Ohio Civil Rights Comm.,* 575 N.E.2d 1164,1167 (Ohio 1991) ("[W]e have determined that federal case law interpreting Title VII . . . is generally applicable to cases involving alleged violations of R. C. Chapter 4112."); *see also supra* note 2.

II. STANDARD OF REVIEW

We review a grant of summary judgment *de novo*. *See Dinsmore Instrument Co. v. Bomardier, Inc.*, 199 F.3d 318, 320 (6th Cir. 1999). Summary judgment is appropriate where there exists no genuine issue of material fact and the moving party is entitled to summary judgment as [a] matter of law. Fed. R. Civ. P. 56(c). As the moving parties, Defendants in this case bear the burden of showing the absence of a genuine issue of material fact as to at least one essential element on each of Plaintiff's claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Plaintiff, as the non-moving party, must then present sufficient evidence from which a jury could reasonably find for him. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). This test requires the Court to determine "whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a mater of law." *Id.* at 251-52. In making this determination, we accept all of Plaintiff's evidence as true and draw reasonable inferences in his favor. *See National Enters., Inc. v. Smith*, 114 F.3d 561, 563 (6th Cir. 1997).

III. SECTION 1981 AND TITLE VII CLAIMS

A. Section 1981 and Section 2000e-2: Race and National Origin Discrimination

In Count I of his complaint, Plaintiff alleges that Defendants discriminated against him on the basis of race and national origin in violation of Title VII, 42 U.S.C. § 2000e-2. Specifically, Plaintiff alleges that Defendants discriminated against him because of his efforts to insure that the University complied with its affirmative action policies, and because of his advocacy on behalf of women

and minorities. In Count IV of his complaint, Plaintiff alleges that Defendants violated his right to be free from discrimination and retaliation in the making and enforcement of contracts on the basis of race, and for his promotion of minorities and women, in violation of 42 U.S.C. § 1981.

A plaintiff may establish a claim of discrimination either by introducing direct evidence of discrimination, or by proving circumstantial evidence which would support an inference of discrimination. *See Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997). "The direct evidence and the circumstantial evidence paths are mutually exclusive; a plaintiff need only prove one or the other, not both." *Id.* Under the direct evidence approach, once the plaintiff introduces evidence that the employer terminated him because of his race or other protected status, the burden of persuasion shifts to the employer to prove that it would have terminated the plaintiff even had it not been motivated by discrimination. *See Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1081 (6th Cir. 1994) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989)).

Under the circumstantial evidence approach, the familiar *McDonnell Douglas-Burdine* tripartite test is employed. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as later clarified by, *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). This paradigm requires the plaintiff to establish a *prima facie* case of discrimination. *See McDonnell Douglas*, 411 U.S. at 802. To establish a *prima facie* case of discrimination, a plaintiff must show that 1) he is a member of a protected class; 2) he was qualified for his job and performed it satisfactorily; 3) despite his qualifications and performance, he suffered an adverse employment action;

and 4) that he was replaced by a person outside the protected class or was treated less favorably than a similarly situated individual outside his protected class.[5] *See id.*; *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992). If the plaintiff is able to do so, a mandatory presumption of discrimination is created and the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* If the defendant carries this burden, then the plaintiff must prove that the proffered reason was actually a pretext to hide unlawful discrimination. *Id.* The plaintiff may establish that the proffered reason was a mere pretext by showing that 1) the stated reasons had no basis in fact; 2) the stated reasons were not the actual reasons; and 3) that the stated reasons were insufficient to explain the defendant's action. *See Wheeler v. McKinley Enters.*, 937 F.2d 1158, 1162 (6th Cir. 1991). "A reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993).

Here, the district court found that Plaintiff's claim failed under either the direct or circumstantial evidentiary pathways because Plaintiff failed to show that he was a member of a protected group. The district court held that Plaintiff's claims failed as a matter of law because Plaintiff "postur[ed] his protected status, not as a member of a racial minority, but rather as a person who advocates on behalf of women and minorities." The district court also held that Plaintiff's claims failed on

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[5] The elements of [a] *prima facie* case as well as the allocations of the burden of proof are the same for employment claims stemming from Title VII and § 1981. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

these counts because as a high-level affirmative action official whose job responsibilities include advocating minority rights, Plaintiff did not engage in protected activity when he engaged in such advocacy. In other words, the district court held that Plaintiff's claims fell prey to summary judgment because Plaintiff could not claim protected status under § 1981 or § 2000e-2(a) only for his advocacy of women and minorities. We disagree. This holding is based on an unmitigated assumption: that for a high-level affirmative action official to have standing to sue under § 2000e-2(a) or § 1981, it is necessary that the affirmative action official be black—or of some other recognized protected group—and that he allege discrimination against himself because of his membership in a recognized protected group. This assumption is contrary to express Congressional intent behind the enactment of Title VII and § 1981, as well as binding case law.

Section 2000e-2(a) of Title VII provides in relevant part as follows:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a) (1994). Section 1981 provides in pertinent part that all persons shall have the same right "to make and enforce contracts," which thereby "includes

the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981 (1994).

It is an established principle that Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was the plight of the African American in our economic society. *See United Steel Workers of Am. v. Kaiser Aluminum & Chemical Co.,* 443 U.S. 193, 201 (1979) (citing 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey) (stating that Title VII was "triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long'")). It is also well-established that affirmative action programs, which were born out of Title VII legislation, are an accepted means of correcting past and preventing future race discrimination in the workforce both in the public and private sector. *See id.* at 204. Furthermore, the Supreme Court has long recognized that § 1981, originally enacted as part of the Civil Rights Act of 1866, was intended to uproot the institution of slavery and to eradicate all of its badges, incidents, and vestiges. *See Jones v. Mayer,* 392 U.S. 409, 422-37 (1968) (finding that based upon the legislative history of the Civil Rights Act of 1866, the broad language of the Act was not "a mere slip of the legislative pen").

Recently, in *Tetro v. Popham,* this Court recognized Title VII's broad reach, and held as a matter of first impression in this Circuit that "Title VII [was designed] to protect individuals who are the victims of discriminatory animus towards third persons with whom the individuals associate." *See* 173 F.3d 988, 994 (6th Cir.

1999). Relying upon the Eleventh Circuit's decision in *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 890 (11th Cir. 1986), where it was held that a white individual had standing and had stated a viable cause of action under Title VII for discrimination based upon an interracial marriage, the *Tetro* court found that a white employee had standing and had stated a viable cause of action against his former employer under Title VII where the white employee was discharged because his child was biracial. *See Tetro*, 173 F.3d at 994. The Court reasoned that "[a] white employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is a prejudice against the biracial child." *Id.* The Court based its reasoning on Title VII's broad remedial purpose and the fact that the statute is worded such that it "simply prohibits discrimination 'because of such individual's race'[;] [t]here is no mention of the words 'directly' or 'indirectly' in the statute." *Id.* at 995. Thus, the Court went on to hold that Title VII protects individuals who are the victims of invidious discrimination towards third persons with whom the individual associates. *Id.* at 994. Simply put, this Court has now spoken that in order to state a cognizable claim under Title VII, the plaintiff himself need not be a member of a recognized protected class; he need only allege that he was discriminated [against] on the basis of his association with a member of a recognized protected class. *See id.*; *see also Troy v. Suburban Management Corp.*, No. 89-1282, 1990 WL 97490, at **5 (6th Cir. July 13, 1990); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) (finding as a matter of first impression that Title VII proscribes discrimination in employment against a woman for her relationship with a black man), *vacated and reinstated in part en banc*, 182 F.3d 333 (5th Cir. 1999).

Similarly, in *Winston v. Lear Siegler, Inc.*, 558 F.2d 1266, 1270 (6th Cir. 1977), this Court addressed as a matter of first impression, "the issue of whether or not the white plaintiff in this action has standing to sue his former employer under § 1981 for discharging him in alleged retaliation for plaintiff's protesting the alleged discriminatory firing of a black co-worker . . . ." In holding that the white plaintiff did in fact have standing to sue under such circumstances, the Court noted that although the white plaintiff "was not fired because of his race, it was a racial situation in which he became involved that resulted in his discharge from his employment, *id.* at 1268, and that Congress' intent behind the enactment of § 1981—to eradicate the badges and incidents of slavery—were best served by such a holding. *Id.* at 1270; *see Alizadeh v. Safeway Stores, Inc.*, 802 F.2d 111, 114 (5th Cir. 1986) ("§ 1981 provides a cause of action to a white spouse who alleges that he was discriminated against in employment because of his marriage to a nonwhite.")

Therefore, based upon this well-settled state of the law, it is clear that Plaintiff need not have alleged discrimination based upon his race as an African American in order to satisfy the protected status requirement of his claims. Indeed, in light of this Court's holding in *Tetro* and *Winston*, the fact that Plaintiff has not alleged discrimination because of *his* race is of no moment inasmuch as it was a racial situation in which Plaintiff became involved—Plaintiff's advocacy on behalf of women and minorities in relation to Defendant's alleged discriminatory hiring practices—that resulted in Plaintiff's discharge from employment. *See Tetro,* 173 F.3d at 994-95; *Winston,* 558 F.2d at 1268; *see also Parr,* 791 F.2d at 892 (holding that "[w]here a plaintiff claims discrimination [in a Title VII action] based upon an interracial marriage or association, he alleges, by

definition, that he has been discriminated against because of his race"). Although obviously not anticipated by the district court's flawed reasoning, it is clear that a Caucasian high-level affirmative action official could bring a claim under § 1981 and § 2000e-2(a) for discrimination based upon his advocacy on behalf of minorities because the discrimination would be "because of such individual's race," where the race of the minorities for which he was advocating would be "imputed" if you will to the Caucasian high-level affirmative action official. *See Tetro,* 173 F.3d at 995.

Furthermore, Plaintiff's efforts to advocate for the A-900 process in the face of Defendants' alleged discriminatory practice is clearly the type of conduct protected by § 1981 and Title VII so as to provide Plaintiff standing. For example, in *Sullivan v. Little Hunting Park, Inc.*, a case "which involve[d] an alleged discrimination against a Negro family in the use of certain community facilities," the Supreme Court found that a Caucasian homeowner had standing to sue under 42 U.S.C. § 1982 when he was expelled from a corporation organized to operate a community park facility for his "advocacy" on behalf of allowing an African-American male and his family to participate in the park facilities. *See* 396 U.S. 229, 231-37 (1969). Specifically, in *Sullivan*, the Court was faced with the following facts:

> Little Hunting Park, Inc., is a Virginia nonstock corporation organized to operate a community park and playground facilities for the benefit of residents in an area of Fairfax County, Virginia. A membership share entitles all persons in the immediate family of the shareholder to use the corporation's recreation facilities. Under the bylaws a person owning a

> membership share is entitled when he rents his home to assign the share to his tenant, subject to approval of the board of directors. Paul E. Sullivan and his family owned a house in this area and lived in it. Later he bought another house in the area and leased the first one to T. R. Freeman, Jr., an employee of the U.S. Department of Agriculture; and assigned his membership to Freeman. The board refused to approve the assignment because Freeman was a Negro. Sullivan protested that action and was notified that he would be expelled from the corporation by the board. A hearing was accorded and he was expelled, the board tendering him cash for his two shares.

Id. at 234-35. When Sullivan and Freeman sued Little Park Hunting, Inc. under § 1981 and § 1982, the trial court denied relief to each petitioner. *Id.*

In reversing the trial court's decision, the Supreme Court held as to Freeman that he had stated a cause of action under § 1982 inasmuch as he had paid a monthly rental for Sullivan's assignment of the membership share in Little Hunting Park, and therefore the transaction in which Freeman engaged was clearly a "lease" transaction protected by § 1982. *Id.* at 236-37. The Supreme Court reasoned as follows:

> The right to 'lease' is protected by § 1982 against the actions of third parties, as well as against the actions of the immediate lessor. Respondents' actions in refusing to approve the assignment of the membership share in this case was clearly an interference with Freeman's right to 'lease.' *A narrow*

> *construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, 14 Stat. 27, from which § 1982 was derived.*

Id. at 237 (emphasis added) (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-37 (1968)). The Supreme Court then found as follows regarding Sullivan's standing to bring his claims:

> We turn to Sullivan's *expulsion for the advocacy of Freeman's cause.* If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. That is why we said in *Barrows v. Jackson*, 346 U.S. 249, 259 [(1953)], that the white owner is at times 'the only effective adversary' of the unlawful restrictive covenant. Under the terms of our decision in *Barrows, there can be no question but that Sullivan has standing to maintain this action.*

Sullivan, 396 U.S. at 237 (emphasis added).

Likewise, in the case at hand, Plaintiff alleged in his complaint that he was sanctioned or punished when, among other things, University officials "excluded him from decisions and policies affecting the West campus and the Alliance . . . because of Plaintiff's support of affirmative-action policies and minority hires[]" protected under Title VII and § 1981. *See* Plaintiff's Amended

Complaint, ¶ 21; J.A. at 100027. Plaintiff also alleged that he was sanctioned or punished for his advocacy on behalf of female and minority hires through his termination, or "expulsion" if you will, from employment by the University. *See id.*, ¶ 28; J.A. at 100029. As in *Sullivan*, if these "sanctions" were allowed to go unredressed, it would give impetus to the perpetuation of racial and minority discrimination in hiring which Title VII of the Civil Rights Act of 1964, affirmative action programs, and § 1981, were designed to prevent. *See Kaiser Aluminum & Chemical Co.*, 443 U.S. at 201; *Sullivan*, 396 U.S. at 237; *Winston*, 558 F.2d at 1270 (finding that the Supreme Court's holding in *Sullivan*, while directed to § 1982, was applicable to § 1981 inasmuch as both statutes were originally enacted as part of the Civil Rights Act of 1866 and were designed with the same purpose in mind: "to uproot the institution of slavery")[6].

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[6] In light of *Sullivan*, and in light of *Winston's* holding that *Sullivan* is applicable to § 1981 claims, the dissent's contention that the majority cannot point to any case where general advocacy of minority rights has been found to violate either § 1981 or Title VII, is unfounded. Furthermore, as stated throughout this opinion, simply because it was Plaintiff's job to insure that Defendants did not engage in discriminatory hiring practices the likes of which Defendants had previously been found to employ, does not thereby immunize Defendants from retaliating against Plaintiff for doing his job. Obviously, the dissent's question as to how the situation would differ if the advocacy was for a plan that failed to meet the standard of *Croson v. City of Richmond*, 478 U.S. 1016 (1986) is rhetorical. If an employee was retaliated against by his employer for speaking out on behalf of minorities, whether or not a plan met the standard of *Croson*, the employee may have a viable claim—irrespective of the employee's race or ethnicity—under § 1981 or Title VII. *See Sullivan v. Little House Park, Inc.*, 396 U.S. 229, 231-37 (1969); *Tetro v. Popham*, 173 F.3d 988, 994 (6th Cir.

Contrary to the district court's assertion, Plaintiff's status as a high-level affirmative action official does not change the fact that his advocacy on behalf of women and minorities is protected activity or that he is a member of a protected class. Simply because the employer has placed an individual in the position of a high-level affirmative action officer and contracted with the individual to advocate on behalf of women and minorities to insure equality in employment within the institution, does not thereby immunize the employer from being held liable for illegally discriminating against that individual for such advocacy. To hold otherwise would allow an institution to contract with an individual for the position of a "high level affirmative action official;" put into place an allegedly nondiscriminatory hiring practice such as the A-900 process; circumvent the hiring process against the express advocacy and advice of the affirmative action official; and discriminate or retaliate against the affirmative action official for his advocacy, thus sending a message to the official that he either remain silent or be "punished."

Said differently, an employer inclined to engage in invidious discrimination in the workplace could hire an affirmative action official in order to convey the false impression that the employer is interested in eliminating illegal discrimination from the workplace, and proceed to retaliate against the official secure in the knowledge that no legal claim could be lodged against the employer for its

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1999); *Winston v. Lear Siegler, Inc.*, 558 F.2d 1266, 1270 (6th Cir. 1977). Indeed, the Supreme Court found Sullivan's "advocacy . . . for trying to vindicate the rights of minorities" to be protected conduct such that Sullivan had standing to sue. *See Sullivan*, 396 U.S. at 237.

actions. Thus, to hold that a high-level affirmative action official cannot bring a Title VII claim for discrimination based upon his or her advocacy of women and minorities would be to invite stratagems designed to circumvent, and indeed, to violate law which was designed to serve "as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history . . . .'" *Kaiser Aluminum & Chem. Corp.*, 443 U.S. at 204 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).

Therefore, having found that Plaintiff was indeed a member of a protected class, and that he proffered direct evidence that he was discriminated against because of his advocacy, we believe that a question of fact exists for the jury to decide whether Defendants terminated Plaintiff out of a discriminatory animus.[7] The district

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[7] An example of such direct evidence offered by Plaintiff is taken from Plaintiff's deposition testimony made in response to the question of whether Dr. Steger, in Plaintiff's view, expressed race consciousness in making hiring decisions:

> During the search for the provost at the University, I made a recommendation to Dr. Steger that proactive consideration be given to Dean Castenell; that based upon the candidates being brought into the University from outside that I felt Dean Castenell had more experience and would be more effective.
>
> Dr. Steger's response was, "We already have two black vice presidents. I can't bring in a black provost." My response was, "Dr. Steger, you're the President of the University, and it's my expectation that you demonstrate the issues and concerns in staffing is that we get the best person available, not the fact that you've

court's approach to this matter turns back the hands of time on the issue of civil rights and equality in employment. The approach that is in line with § 1981 and Title VII's broad remedial purpose, as well as the case law in support thereof, is to allow the *jury* to decide whether the high-level affirmative action official was discriminated against for his "advocacy" on behalf of women and minorities, irrespective of whether the advocacy was part of the official's contractual duties. That is not to say that every job-related action undertaken by a high-level affirmative action official should be considered protected conduct. However, when the action undertaken by the official is the advocacy of hiring practices that do not discriminate on the basis of race, sex, or ethnicity—such as Plaintiff's advocating a nondiscriminatory hiring practice in line with the A-900 process—the advocacy can indeed be considered protected conduct under Title VII and § 1981, and a jury should decide whether a defendant employer has discriminated or retaliated against the high-level affirmative action official for this advocacy.

> got three senior black officers." His response was, "Faculty would kill me if I would bring in a black provost, particularly with us already having two black vice presidents at the University."
>
> That was a very disturbing response, to me, for a president to be making to the Vice President of Human Resources, when I had been charged always to ensure that we hire the best person possible and that we always identify a diverse pool of candidates and that we give full consideration to them based upon experience, their expertise, and whether they would be able to do the job or not.

(J.A. at 100737-38.)

In every civil rights action it is the responsibility of the jury [to] determine whether the defendant's actions were invidious, pretextual, or improperly motivated. This case is no different. We therefore reverse the district court's grant of summary judgment to the University and Dr. Steger in his official capacity on Plaintiff's claims brought under § 2000e-2, and to Dr. Steger and Dr. Harrison individually on Plaintiff's claims brought under § 1981.

B. Section 2000e-3(a): Retaliation Discrimination under the Opposition & Participation Clauses

Section [ ] 2000e-3(a) provides in relevant part as follows[:]

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (1994). Thus, this section prohibits an employer from retaliating against an employee who has "opposed" any practice by the employer made unlawful under Title VII; and prohibits an employer from retaliating against an employee who has "participated" in any manner in an investigation under Title VII. *See Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1312 (6th Cir. 1989); *see also Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 791-92 (6th Cir. 2000).

In Count V of his complaint, Plaintiff claims that Defendants discriminated against him because he "opposed" the hiring of individuals in conflict with the A-900 process; and that Defendants terminated him in retaliation for Plaintiff's "participation" in filing an EEOC claim.

To establish a claim under either clause, Plaintiff must meet the test of a slightly modified *McDonnell Douglas* framework by showing that: 1) he engaged in activity protected by Title VII; 2) this exercise of protected rights was known to Defendants; 3) Defendants thereafter took an adverse employment action against Plaintiff, or Plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and 4) there was a causal connection between the protected activity and the adverse employment action or harassment. *See Morris*, 201 F.3d at 792 (citing *Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990)). If Plaintiff establishes a prima facie case under either clause, then the burden shifts to Defendants to articulate a legitimate, nondiscriminatory reason for Plaintiff's discharge. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 802). Plaintiff must then demonstrate that the proffered reason was not the true reason for the employment action—i.e., that the reason was a mere pretext for discrimination. *Id.* (citing *Burdine*, 450 U.S. at 256).

In this case, the district court found that Plaintiff's claims brought under both the opposition clause and the participation clause of § 2000e-3(a) failed as a matter of law because Plaintiff could not have held a good faith belief that he was engaged in protected activity in reference to either claim. We disagree, and will address each of Plaintiff's claims in turn.

1. The Opposition Clause

In conjunction with his allegations that his termination was discrimination for his advocacy on behalf of women and minorities, Plaintiff similarly contends that the University retaliated against him for his advocacy efforts in opposition to Defendants' alleged unlawful employment practices. The district court found that Plaintiff's claim failed at the inception because, as an affirmative action official, Plaintiff could not have reasonably believed that the conduct he was opposing was protected activity. Relying upon *Holden v. Owens-Illinois*, 793 F.2d 745, 748-49 (6th Cir. 1986), the district court reasoned that because attempts to implement an affirmative action program that complies with Executive Order 11246 are not protected by Title VII, and because Plaintiff is presumed to know the state of the law, it follows that Plaintiff could not have reasonably believed that he was opposing conduct that is protected under Title VII, and that his claim brought under this clause therefore failed. We find the district court's application and extension of *Holden* to the facts of this case contrary to Title VII's intent.

As accurately argued by Plaintiff, the scope of *Holden* extends only to an employee who protests the *implementation* of the affirmative action program; because Plaintiff protested *discrimination* that occurred in the hiring process, which was contrary to law as well as the affirmative action program, his case falls beyond *Holden's* reach. To hold otherwise would improperly expand the scope of *Holden* to include not only the employee who protests an employer's *failure to implement* an affirmative action program under Title VII, but also the employee who *opposes discrimination* that occurs in

the hiring process the likes of which the affirmative action program was designed to correct and prevent.

Furthermore, the fact that Plaintiff may have had a contractual duty to voice such concerns is of no consequence to his claim. Under Title VII, an employee is protected against employer retaliation for opposing any practice that the employee reasonably believes to be a violation of Title VII. The Equal Employment Opportunity Commission ("EEOC") has identified a number of examples of "opposing" conduct which is protected by Title VII, including complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; refusing to obey an order because the worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer—e.g., former employers, union, and co-workers. *EEOC Compliance Manual,* (CCH) ¶ 8006.[8] The EEOC has qualified the scope of the opposition clause by noting that the manner of opposition must be reasonable, and that the opposition be based on "a reasonable and good faith belief that the opposed practices were unlawful." *Id.* In other words, a violation of Title VII's retaliation provision can be found whether or not the challenged practice ultimately is found to be unlawful. *Id.* Moreover, the person claiming retaliation need not be the person who engaged in the opposition, such that "Title VII . . .

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[8] Pursuant to the Supreme Court's directive, the EEOC's interpretation of Title VII is to be given "great deference" by the courts. *See Griggs v. Duke Power Co.,* 401 U.S. 424, 434 (1971); *see also Tetro,* 173 F.3d at 994 (relying upon the EEOC's interpretation of Title VII in support of the Court's holding); *Ladd v. Sertoma Handicapped Opportunity Program, Inc.,* 917 F. Supp. 766, 767 (N.D. Okla. 1995) (finding that "[a]lthough not binding on this Court, the EEOC's position on a subject squarely within its field of expertise is significant").

prohibit[s] retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights." *Id.*

In short, the only qualification that is placed upon an employee's invocation of protection from retaliation under Title VII's opposition clause is that the manner of his opposition must be reasonable. Of critical import here is the fact that there is no qualification on who the individual doing the complaining may be or on the party to whom the complaint is made known—i.e., the complaint may be made by anyone and it may be made to a co-worker, newspaper reporter, or anyone else about alleged discrimination against oneself or others; the alleged discriminatory acts need not be actually illegal in order for the opposition clause to apply; and the person claiming retaliation need not be the person engaging in the opposing conduct. *See EEOC Compliance Manual* (CCH) ¶ 8006; *see also Booker,* 879 F.2d at 1312-13 (holding that "[a] person opposing an apparently discriminatory practice does not bear the entire risk that it is in fact lawful; he or she must only have a good faith belief that the practice is unlawful"); *Keys v. U.S. Welding, Fabricating & Mfg., Inc.,* No. CV91-0113, 1992 WL 218302, at *5 (N.D. Ohio Aug. 26, 1992) (noting that "[u]nder § 704(a) of Title VII, [the plaintiff] needed only a 'good faith belief' that the company practice about which he was complaining violated Title VII; it is irrelevant whether the allegations are ultimately determined to violate Title VII").

Therefore, it logically follows that the district court's conclusion, that as a high-level affirmative action official Plaintiff could not claim protected status under the opposition clause for his advocacy on behalf of women

and minorities, runs counter to the broad approach used when considering a claim for retaliation under this clause, as well the spirit and purpose behind Title VII as a broad remedial measure. By extending the scope of *Holden,* the district court allows for an employer to retaliate against the person best able to oppose the employer's discriminatory practices—the "high-level affirmative action official"—without fear of reprisal under Title VII. Indeed, the individual who has contracted to advocate on behalf of women and minorities has not thereby contracted to be retaliated against for his advocacy.

In addition, the actions taken by Plaintiff in response to hiring decisions which he felt were discriminatory and not in line with the A-900 process were sufficient to constitute opposition under Title VII. For example, Plaintiff sent letters to Dr. Steger voicing his objections to the hiring of Mr. Cohen and the Vice-Chairman of the Department of Surgery on the grounds that these individuals were hired in a discriminatory manner. Furthermore, in a letter dated September 21, 1995, sent by Plaintiff to Dr. Steger regarding Defendant's desire to waive advertising for the Vice-Chairman position, Plaintiff complained that "the apparent underutilization of minorities and women at the University Hospital and Medical College demonstrates the lack of commitment or intent to create an equal playing field for qualified candidates, or the development of a mentorship program which would support a safe learning environment for non-whites." Unlike *Booker v. Brown & Williamson Tobacco Co., Inc.,* where the plaintiff was contesting a single decision made by his employer in a letter which he sent to his employer's human resource department, Plaintiff in this case was opposing Defendant's discriminatory hiring conduct as a whole. *See* 879 F.2d at 1312-13 (recognizing that the

lawfulness of the employment practice must be broadly construed, so that the person opposing an apparently discriminatory practice does not bear the risk that practice is in fact lawful); *see also supra* note 7. One example of Defendants' discriminatory hiring practice which Plaintiff opposed was Defendants' decision not to advertise for the Vice-Chairman position.

Accordingly, having established that he opposed conduct which he reasonably believed to be unlawful, and that Defendant was aware of Plaintiff's opposition, Plaintiff also provided evidence to show that his opposition was causally related to his discharge. For example, Plaintiff's complaints led to a reply memorandum from Dr. Steger wherein he criticized Plaintiff's character and performance, and approximately one month after Plaintiff filed his charge of discrimination with the EEOC, Dr. Steger informed Plaintiff that he was being immediately removed from his position at the University. *See, e.g., EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987); *see also* discussion *infra* Part III.B.2. discussing the causal connection between Plaintiff's filing of his EEOC complaint and his termination in reference to his claim brought under the participation clause. Thus, Plaintiff has demonstrated a *prima facie* case of retaliatory discrimination under Title VII's opposition clause through his claims that he opposed Defendant's violations of Title VII, that Defendant knew of Plaintiff's opposition, and that Plaintiff's opposition was causally related to his termination. *See Walborn v. Erie County Care Facility,* 150 F.3d 584, 588-89 (6th Cir. 1998).

To fully dispose of the remaining inquires under the *McDonnell Douglas* framework, we must also

determine whether Defendants offered a legitimate, nondiscriminatory reason for Plaintiff's dismissal and whether Plaintiff can show that the reasons were a mere pretext for retaliatory discrimination. Defendants offered the reasons outlined in Dr. Steger's memorandum sent to Plaintiff on January 9, 1996, wherein Dr. Steger evaluated Plaintiff's performance, as a non-exhaustive list of reasons for Plaintiff's termination; however, Defendants contend that the primary reasons that Plaintiff was terminated were his handling of the 925 negotiations and his overall poor administration of his department. In response, Plaintiff offered deposition testimony which countered all of Defendants' alleged reasons for Plaintiff's discharge, as well as evidence that other employees feared cooperating with the investigation into Plaintiff's termination because they anticipated reprisals.

After careful review of the record, we hold that Plaintiff has created an issue of fact for the jury as to whether Defendants' proffered reasons for Plaintiff's discharge were merely pretextual by suggesting that Defendants' justifications possibly have no basis in fact or are insufficient to explain his discharge, and are not the true reasons for Plaintiff's termination. We therefore reverse the district court's grant of summary judgment to the University and Dr. Steger in his official capacity on Plaintiff's claim brought under the opposition clause of Title VII.

2. The Participation Clause

To establish a claim of retaliation under the participation clause, Plaintiff must make a *prima facie* case by showing that Defendants discharged him because he filed a claim with the EEOC. As with Plaintiff's claim brought under the opposition clause, the district court found that Plaintiff did not hold a good faith belief that he was engaging in protected activity when he filed his EEOC complaint, and that Plaintiff's claim on this issue thus failed as a matter of law. The district court reasoned that Plaintiff filed his claim with the EEOC as a protective measure to insure the security of his job—because he was aware that Dr. Steger was not happy with the manner in which Plaintiff handled the 925 negotiations—and not because he reasonably believed that he was being discriminated against. Once again, we disagree with the district court.

In reaching its erroneous conclusion, the district court failed to liberally construe Plaintiff's participation clause claim and instead improperly resolved it as an issue of fact; specifically, the district court improperly determined Plaintiff's motive and good faith in filing the charge. The district court's conclusion is contrary to our decision in *Booker*:

> The "exceptionally broad protections" of the participation clause extend[ ] to persons who have "participated in any manner" in Title VII proceedings. *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1006 (5th Cir. 1969). Protection is not lost if the employee is wrong on the merits of the charge, *Womack v. Munson*, 619 F.2d 1292, 1298 (8th Cir. 1980), *cert. denied*, 450 U.S. 979, 101 S. Ct. 1513, 67

> L. Ed. 2d 814 (1981), nor is protection lost if the contents of the charge are malicious or defamatory as well as wrong. *Pettway*, 411 F.2d at 1007. Thus, once activity in question is found to be within the scope of the participation clause, the employee is generally protected from retaliation.

Booker, 879 F.2d at 1312.

Even if the district court had some basis for viewing Plaintiff's EEOC complaint as Plaintiff's way of protecting himself, this does not necessarily imply that Plaintiff did not believe that he suffered retaliation for his advocacy *prior* to the 925 negotiations. Plaintiff could have reasonably believed that he had a viable discrimination claim on the basis of his advocacy right as an affirmative action representative and his affiliation with PACRRHD. Thus, Plaintiff could have reasonably believed that he was engaging in protected activity when he filed his EEOC complaint. Our holding in this regard represents the first in this Circuit dealing with general advocacy rights under Title VII and § 1981 for a cabinet-level affirmative action/human resource vice-president.

Accordingly, having established that Plaintiff was engaged in a protected activity when he filed his complaint with the EEOC, Plaintiff has satisfied the first step of the inquiry into his *prima facie* case of retaliation. In light of the following evidence, which we view in the light most favorable to Plaintiff, we believe that he has met the next two parts of his *prima facie* case. On December 5, 1995, Plaintiff filed a complaint with the EEOC, alleging discrimination on the basis of race and advocacy of minority and women's rights. On December

20, 1995, Dr. Steger announced to the Cabinet that Plaintiff had filed the EEOC charge and the Defendants would have to defend themselves against the charges. That same day, Dr. Steger promised to deliver a letter to Plaintiff that outlined his standing with the University. On January 9, 1996, Dr. Steger sent Plaintiff a memorandum that enumerated several problems with Plaintiff's performance; then, on January 17, 1996, Plaintiff received his termination notice. As such, in addition to establishing that he engaged in a protected activity under Title VII by filing his EEOC complaint, Plaintiff also established that his filing was made known to the University by Dr. Steger's announcement at the Cabinet meeting, and that Plaintiff suffered an adverse employment decision.

In order to meet the final step of his *prima facie* case, Plaintiff must establish a causal link between his filing of the EEOC claim and his termination. A causal link may be shown through knowledge combined with closeness in time that creates an inference of causation. In order make such a showing, the plaintiff must produce sufficient evidence for a reviewing court to infer that the employer would not have taken the adverse action had the plaintiff not filed a discrimination action. *See Avery Dennison Corp.*, 104 F.3d at 861; *Zanders* v. *National R.R. Passenger Corp.*, 898 F.2d 1127, 1135 (6th Cir. 1990). Although temporal proximity alone does not support an inference of retaliatory discrimination in the absence of other evidence, closeness in time between the filing with the EEOC and the adverse employment action is relevant and may evince the employer's intent. *See Cooper v. City of North Olmstead*, 795 F.2d 1265, 1272-73 (6th Cir. 1986) ("The mere fact that [the plaintiff] was discharged four months after filing a discrimination claim is insufficient to support an inference of retaliation."). In short, in order

to meet the final prong of his *prima facie* case, Plaintiff must "put forth some evidence to deduce a causal connection between the retaliatory action and the protected activity [which requires] the court to draw reasonable inferences from that evidence, providing it is credible." *See Avery Dennison Corp.*, 104 F.3d at 861. We believe that Plaintiff has met his burden of showing a temporal proximity between his filing of his EEOC complaint and his termination, coupled with other evidence, sufficient to establish causation.

For example, Plaintiff has shown that his first two performance evaluations had been strong prior to his filing of the EEOC charge. Plaintiff has also shown that the University hospital resisted his efforts, particularly with respect to the hiring of the SEO and the Vice-Chairman of the Department of Surgery, and that he was excluded from a retreat where many other human resource administrators met to discuss the hospital merger. Furthermore, the same day that Dr. Steger informed the Cabinet of Plaintiff's filing of his EEOC complaint and that they may have to defend against it, Plaintiff requested a performance evaluation from Dr. Steger and only in response to this request did Dr. Steger then scrutinize Plaintiff's performance and provide him with a negative evaluation. On January 16, 1996, Plaintiff responded to Dr. Steger's evaluation by sending Dr. Steger an evaluation accusing him of, among other things, retaliating against Plaintiff for filing an EEOC claim. The next day, Dr. Steger terminated Plaintiff from his duties at the University. Considering this evidence in the light most favorable to Plaintiff, a reasonable jury could find that Plaintiff was retaliated against for filing his complaint and charge with the EEOC.

As with Plaintiff's claim brought under the opposition clause, Plaintiff has created an issue of fact for the jury as to whether Defendants' proffered reasons for Plaintiff's discharge were merely pretextual by suggesting that Defendants' justifications possibly have no basis in fact or are insufficient to explain his discharge, and are not the true reasons for Plaintiff's termination. We therefore reverse the district court's grant of summary judgment to the University and Dr. Steger in his official capacity on Plaintiff's claim brought under the participation clause of Title VII.

IV. SECTION 1983 CLAIM FOR VIOLATION OF FIRST AMENDMENT RIGHTS

In Count VI of his amended complaint, Plaintiff brought a claim under 42 U.S.C. § 1983, alleging that Defendants retaliated against him for voicing his concerns about Defendant's failure to properly implement and comply with the A-900 process—Defendant's affirmative action program—in violation of Plaintiff's First Amendment right to free speech.

As a public employee, to establish a § 1983 claim that Defendants denied Plaintiff his right to free speech under the First Amendment, Plaintiff had to prove that 1) the action was taken against him for speech that was directed toward an issue of public concern, and that 2) his interest in speaking as he did outweighed Defendants' interest in regulating his speech. *See Connick v. Myers,* 461 U.S. 138, 147 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). The initial inquiry into determining whether a public employee's speech is a matter of public concern is a question of law for the court to decide. *Rankin v. McPherson,* 483 U.S. 378, 386 n.9 (1987). Absent unusual circumstances, a public employee's

speech dealing with "matters only of personal interest" is not afforded constitutional protection. *See Connick,* 461 U.S. at 147. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48.

If Plaintiff's speech in this regard is found to be a matter of public concern and thus protected, the next inquiry is whether Plaintiff's free speech interests outweighed Defendants' interest in regulating his speech under the well known *Pickering* balancing test. *See Pickering,* 391 U.S. at 568. If Plaintiff's interests in speaking outweighed that of Defendants' interests, then Plaintiff's First Amendment rights have been violated. *See Dambrot v. Central Mich. Univ.,* 55 F.3d 1177, 1186 (6th Cir. 1995). If the First Amendment violation was a substantial or motivating factor in Defendants' action against Plaintiff, Defendants may present evidence that they would have terminated Plaintiff in the absence of his protected conduct, which is a question of fact for the jury to decide. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977).

In this case, the district court found [ ] Plaintiff's speech on Defendants' noncompliance with its affirmative action program to be a matter of public concern. However, the court found that the University's interests maintaining its hiring process without disruption outweighed Plaintiff's right to free speech. Although we agree with the district court that Plaintiff's speech regarding the University's failure to comply with the A-900 process was a matter of public concern, we disagree that the University's purported interests outweigh Plaintiff's right to free speech.

In *Meyers v. City of Cincinnati,* this Court held that "[j]ust as an opinion concerning the general policy of affirmative action would be a matter of public concern, so too is speech concerning methods of implementing affirmative action." 934 F.2d 726, 730 (6th Cir. 1991), *modified on other grounds,* 979 F.2d 1154 (6th Cir. 1992). The plaintiff in *Meyers* held the title of "assistant fire chief in charge of personnel," and he allegedly made statements which were "in direct contravention of city policy on affirmative action" to two employees of an organization the purpose of which was to assist minorities in competing for jobs. *Id.* at 727. The plaintiff claimed that his statements on affirmative action led to his constructive discharge. *Id.* at 729. In finding that the plaintiff's statements were protected under the First Amendment in that they addressed a matter of public concern, we noted that the case was "analogous to *Rankin* [*v. McPherson*], not *Connick* [*v. Myers*]." *Id.* We then opined as follows:

> In *Connick* permissible employment action was taken as a result of an internal office dispute about a transfer, and the speech was concerned only with internal office policy. In *Rankin* the employee had no dispute with her employer until she stated at work that if a second attempt were made on the President's life she hoped it would be successful. The court held that in context the speech addressed the employee's dissatisfaction with the President's cuts in Medicaid, CETA and welfare benefits. The Court said that "conversation addressing the policies of the President's administration . . . [made] on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the

> life of the President," is plainly a matter of public concern. *Rankin*, 483 U.S. at 386, 107 S. Ct. at 2898. The speech scrutinized in *Rankin* was in the form of an opinion, made in a private conversation later reported to the employee's supervisor.

Id. The *Meyers* Court concluded that "speech about a politically charged issue like affirmative action—whether pro or con—should be considered a matter of public concern." *Id.* at 730.

As in *Meyers*, Plaintiff's speech was made known to his supervisor, Dr. Steger, and dealt with the University's failure to comply with policies relating to its affirmative action program. Therefore, Plaintiff's speech was a matter of public concern. *See* 934 F.2d at 730. The fact that Plaintiff directed his complaints and concerns to Cabinet officials rather than the general public, is of no consequence because the subject matter of Plaintiff's complaints was an established matter of public concern in this circuit—"an opinion concerning the general policy of affirmative action . . . ." *See id.*; *see also Chappel v. Montgomery County Fire Protection Dist. No. 1,* 131 F.3d 564, 579 (6th Cir. 1997) ("Constitutional protection for speech on matters of public concern is not premised on the communication of the speech to the public."). The plaintiff in *Rankin* voiced her opinion about the President in a private conversation which was later reported to her employer; however, the Supreme Court found that the speech, even though internal, was nonetheless of a public concern and therefore protected because it involved the President. *See Rankin,* 483 U.S. at 386. The same reasoning applies to this case.

Therefore, having found that Plaintiff's speech was a matter of public concern, the next relevant inquiry under this claim concerns comparing the University's proclaimed need to run an efficient organization against Plaintiff's right to speak. *See Pickering,* 391 U.S. at 568. "In order to justify a restriction on speech of public concern by a public employee, plaintiff's speech must impair discipline by superiors, have a detrimental impact on close working relationships, undermine a legitimate goal or mission of the employer, impede the performance of the speaker's duties, or impair harmony among co-workers." *Meyers,* 934 F.2d at 730.

Here, the district court found that Plaintiff's speech at issue was a matter of public concern, but that the University's interest outweighed Plaintiff's right to free speech in this context, because Plaintiff's verbal complaints about the University's failure to comply with its A-900 procedure was "causing a tremendous disruption in the University's ability to deliver its services." (J.A. at 100088.) The district court based its conclusion on various evidence in the record that Plaintiff had been tying up employment decisions within the University because of his protests regarding the University's failure to follow its affirmative action program. *Id.* We disagree with the district court's conclusion that the University's interest outweighed Plaintiff's interest in speaking out on behalf of the University's failure to comply with its affirmative action policies. Even if Plaintiff's speech delayed the University's hiring of prospective employees, this does not rise to the level of having a detrimental impact on close working relationships or undermining a goal or mission of the University. *See Meyers,* 934 F.2d at 730. To the contrary, Plaintiff's speech regarding the University's failure to comply with its A-900 process promoted or advanced the

University's alleged goal of employment equality for women and minorities; his speech did not undermine that goal. Furthermore, the district court's grant of summary judgment based upon its determination that there were no material factual disputes regarding the disruptive impact of Plaintiff's complaints upon the University's business was improper in any event; the contested issues of fact, based upon the parties' differing characterizations of the evidence, are very much in dispute and would be best left for determination at trial. *See Mount Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 287. We therefore reverse the district court's order granting summary judgment to Dr. Steger and Dr. Harrison individually on this claim.

CONCLUSION

For the above-stated reasons, we **AFFIRM** the grant of summary judgment to the University on Plaintiff's claims brought under the 42 U.S.C. § 1981 and § 1983 on Eleventh Amendment immunity grounds; and to Dr. Steger and Dr. Harrison individually on Plaintiff's claims brought under Title VII. However, we **REVERSE** the grant of summary judgment to the University and Dr. Steger in his official capacity on Plaintiff's claims brought under § 2000e-2, and under both the opposition and participation clauses of § 2000e-3; and to Dr. Steger and Dr. Harrison on Plaintiff's claims brought under § 1981 and § 1983. We also **REVERSE** any corresponding pendent state law claims and **REMAND** the matter for trial.

CONCURRING IN PART, DISSENTING IN PART

KENNEDY, concurring in part and dissenting in part. While I agree with the majority's resolution of the immunity issues and Dr. Johnson's retaliation claim under the participation clause, I dissent from the majority opinion because I disagree with the majority's resolution of the rest of the plaintiff's claims. In particular, I disagree with the majority's analysis of the plaintiff's claims under Title VII and § 1981. I also dissent from the majority's decision on the plaintiff's First Amendment claims.

The majority holds that the plaintiff presented direct evidence of the defendants' discrimination through his testimony concerning University officials' expressions of race consciousness during the hiring process. This testimony, however, does not provide direct evidence of the defendants' discrimination against the plaintiff based on his advocacy of minority rights.[1] Because plaintiff's

[1] In his brief to this court, the plaintiff identified three issues for review. His claims under Title VII, §1981, and the First Amendment were couched in terms of his advocacy upon behalf of minorities. In particular, his brief states the issues as follows:

> "2. Whether, for Mr. Johnson's Title VII and 42 U.S.C. §1981 claims, he had a protected status because he advocated minority rights.
>
> 3. Whether, for Mr. Johnson's First Amendment retaliation claim, the importance of his advocacy of minority rights outweighed UC's interest in

claim is based on his advocacy, the direct evidence of discrimination also must concern advocacy. I find no direct evidence in the record establishing that any of the defendants discriminated against the plaintiff based on his advocacy; therefore, the plaintiff's claim can survive only if he can establish a prima facie case of discrimination under the *McDonnell Douglas-Burdine* test. As stated in the majority opinion, the plaintiff must show that (1) he is a member of a protected class; (2) he was qualified for his job; (3) he suffered an adverse employment action; and (4) he was replaced by someone outside the protected class or was treated differently than a similarly situated individual outside the protected class. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). I do not

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maintaining the operation of its affairs."

In addition, his complaint to the EEOC stated:

> The university employs me as the Vice President for Human Resources. The institution has obstructed me from performing my assignment as the executive authorized for planning and operating human resource systems for the east and west . . .
>
> President Joseph Steg[e]r tells me that I am authorized to perform my executive level duties, but he also fails to give me adequate support for my position on both campuses.

The plaintiff does not raise any issues contending that he experienced discrimination based on his race or national origin and any attempt to construe his claim as anything but a claim based on his advocacy of minority rights is erroneous. Recasting the plaintiff's claim as one of advocacy on behalf of specific individuals as the majority appears to do, rather than one of general advocacy, fails because the plaintiff presented no evidence connecting his advocacy on behalf of these specific individuals to his discharge.

believe that the plaintiff has satisfied either the first or fourth prong of this test. In my discussion of plaintiff's retaliation claim under the opposition clause of Title VII, I address the plaintiff's status as a member of a protected class. For purposes of this analysis, I will limit my dissent to the plaintiff's failure to establish the existence of the fourth prong, although I believe that my analysis of plaintiff's protected status below applies equally to these claims. The protected class to which the plaintiff claims membership can be classified as the class of advocates for minorities. The plaintiff has presented no evidence to establish either that he was replaced by someone who was not an advocate for minorities or that other "non-advocates" who were similarly situated were treated differently. The plaintiff[ ] has failed to establish a prima facie case of discrimination; therefore, his section 1981 claims against Dr. Steger and Dr. Harrison in their individual capacit[ies] and his section 2000e-2 claims against the University and Dr. Steger in his official capacity cannot survive.

I also am at a loss as to how the majority can sustain plaintiff's § 1981 claim against Dr. Harrison in his individual capacity. The plaintiff has presented no evidence that Dr. Harrison influenced the University and its officials in the decision to relieve the plaintiff of his duties. In his brief to this court, the plaintiff does not even address the viability of his § 1981 claim against Dr. Harrison. Instead, he focuses his argument on Dr. Steger's role in his dismissal. I believe the plaintiff chose this tactic because there were no grounds upon which to find Dr. Harrison liable for a § 1981 violation and I believe that it is error for this court not to dismiss plaintiff's § 1981 claim against Dr. Harrison in his individual capacity.

Plaintiff's claims under § 1981 and § 2000e-2 of Title VII, along with plaintiff's retaliation claim under the opposition clause of Title VII, also fail because plaintiff has failed to establish that he is a member of a protected class. Although the majority attempts to show that it has been long established that an advocate for a minority who has been discriminated against is protected under Title VII and § 1981, I believe that the majority's analysis of our prior cases is fundamentally flawed. I agree with the majority that individuals are permitted to pursue claims of discrimination based on their advocacy of another person's rights, but, in all of these cases, the individual is advocating upon the behalf of a specific individual or specific individuals whose constitutional rights or Title VII rights have been violated. Plaintiff's claim is not based on his advocacy of specific individuals, but rather, he claims protected class status based on his general advocacy. When we extend protected class status to individuals like the plaintiff, we undermine the protections afforded by Title VII and the Constitution. Plaintiff's claim against the University and its employees basically boils down to a disagreement over the implementation of an affirmative action program. This Circuit, in *Holden v. Owens-Illinois*, 793 F.2d 745, 751 (6th Cir. 1986), held that an employee does not obtain protected status simply because the employee handles affirmative action matters in the course of employment. I do not believe this case can be distinguished from *Holden*. An affirmative action official's job is to advocate on behalf of minorities and the majority's holding that when an affirmative action official disagrees with his employer he has a cause of action under Title VII creates a disincentive for employers in their decision to establish an affirmative action officer position. The majority attempts to distinguish *Holden* by stating that the plaintiff was not protesting the implementation of an affirmative action

program, but rather, he was protesting discrimination in hiring. In reality, there is no distinction. The plaintiff contends that he was terminated for his active advocacy on behalf of minorities, yet, this was his job. If he was not performing his job to the satisfaction of his employers, the University is entitled to dismiss him. The plaintiff has presented no evidence that his advocacy went beyond the scope of his employment, and I believe this is significant. I do think that the plaintiff's employment as a high level affirmative action officer does and should make a difference in the analysis of his claims. Because it was his job to advocate on behalf of minorities I do not think he is entitled to protected status for his general advocacy on behalf of minorities. For this reason, I believe that the defendants are entitled to summary judgment on plaintiff's claims under section 1981, section 2000e-2 of Title VII and the opposition clause of section 2000e-3(a) [of] Title VII.[2] Because the plaintiff's claim under the

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[2] When you come to the claim that Dr. Steger violated § 1981 because of plaintiff's general advocacy for the use of the affirmative action plan and disagreement over the President's use of the waiver for particular jobs, the plaintiff's claim is even more murky. Plaintiff has not claimed that the University of Cincinnati violated section 1981 or Title VII in its failure to hire any specific individuals. While he made that claim on his own behalf in the District Court, he has not appealed its dismissal. His disagreement with the University related to the implementation of its affirmative action plan, a plan the University maintained even though the term of the plan had expired and which was adopted without any finding or admission of discrimination.

The failure to hire the African-American candidate as head of the Alliance hospitals was not even covered by the affirmative action plan. Nor did Dr. Steger participate in it.

The majority can point to no case where discrimination based on general advocacy of minority rights has been found to

participation clause of section 2000e-3(a) should be liberally construed and his termination occurred in close proximity to his filing of an EEOC claim while complaints with respect to his performance occurred over an extended period, I agree with the majority that the district court erred in granting summary judgment on this claim.

Finally, I turn to plaintiff's claims under the First Amendment. While I am aware of the cases in which courts have held that discussions of affirmative action are a matter of public concern, I do not think those cases apply where the speaker is a high level affirmative action official and the communications are within the organization. In his position at the University, the plaintiff's job was to advocate on behalf of minorities. Technically, every word that the plaintiff spoke during his tenure in this position concerned affirmative action because of the nature of his job. In the unique circumstances of this case, I do not think that the plaintiff is entitled to the protections of the First Amendment unless he can show that his speech was not integrally connected with his job. When considering whether an employee's speech is protected by the First Amendment, this Supreme Court has adopted a two part inquiry. First, the Court asks whether the speech was of public concern. If that question is answered in the affirmative, the next question is whether the plaintiff's interest in speaking outweighed the defendant's interest in regulating his speech. *See Connick v. Meyers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983); *Pickering v.*

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violate either § 1981 or Title VII. What if the general advocacy is for a plan that fails to meet the standard of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L.Ed.2d 854 (1989)?

Board of Educ., 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968). In this case, I do not think that the inquiry can be separated into two steps. Instead, the two steps merge when the employee's position requires him to speak on issues that normally would be of public concern. Because the plaintiff's speech concerned the inner workings of the University's affirmative action procedures and occurred while he was acting in his official position and consisted only of a letter and memos addressed to the president and other members of the Board of Trustees (of which plaintiff was a member as Vice President of Human Relations), I think that the University had a significant interest in regulating the speech to make certain that it was presented in the most informative and helpful manner. Had the plaintiff presented his concerns in a public venue, my resolution of this issue would be different. The plaintiff, however, limited his speech to the confines of the University and conveyed his views in his official position as to the success or lack of success of the University's affirmative action program. I believe that in this situation the plaintiff's speech is not entitled to First Amendment protections. I think that the district court did not err in granting summary judgment in favor of the defendants on plaintiff's First Amendment claims.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-3016

JOHN B. JOHNSON, Plaintiff-Appellant,

v.

UNIVERSITY OF CINCINNATI, ET AL., Defendants-Appellees.

[Filed: August 9, 2000]

BEFORE: KENNEDY, DAUGHTREY, and CLAY, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further review the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-96-0727

John B. Johnson, Plaintiff,

v.

University of Cincinnati, *et al.*, Defendants.

[Filed: December 15, 1997]

ORDER

This matter is currently before the Court to consider Defendants' Motions for Summary Judgment (Doc. Nos. 10 & 11). Plaintiff has before the Court a Motion to File Sur-reply to Defendants' Motion for Summary Judgment (Doc. No. 24). For the reasons and analysis set forth below, Defendants' motions for summary judgment are well-taken and are **GRANTED**. Plaintiff's Motion to File Sur-reply is deemed **MOOT.**

I. Background

Plaintiff John B. Johnson is an African-American male. Defendant University of Cincinnati ("the University") is an institution of higher education operated by the state of Ohio. The University is also a government contractor and subject to Executive Order 11246, which requires it to implement and operate an affirmative

action program. Defendant Joseph Steger is the President of the University and was Plaintiff's direct supervisor. Defendant Donald Harrison is a Senior Vice President of the University and Provost of the University Hospital, the hospital formerly operated by the University.

In 1993, Defendant Steger, on behalf of the University, recruited Plaintiff to become the University's Vice President of Human Resources and Human Relations ("VPHRHR"). This position was a recently-created position at the University. Only one other person had held that position before the Plaintiff. The VPHRHR was a "Cabinet-level" position in that it reported directly to the President. While the VPHRHR was to administrate the typical personnel-related functions—payroll, compensation, benefits, labor negotiations, affirmative action, etc.—Defendant Steger envisioned a role for the VPHRHR that transcended these rather mundane functions. As envisioned, the VPHRHR would do more than see that the University complied with the legal technicalities of Executive Order 11246, the VPHRHR would be the focal point for developing a new culture in which diversity was promoted and willingly accepted by all participants in the University community. Plaintiff signed a three year employment contract and assumed the duties of VPHRHR on August 1, 1993.

As noted, Plaintiff was responsible for operating the University's affirmative action program. Central to the operation of the affirmative action program, and indeed, to understanding this case, is what is known as the "A-900 process." The A-900 is an internal form used by the University. The A-900 arose out of what is known as the "Conciliation Agreement of 1978" entered into by

the University and the Office of Federal Contract Compliance Programs ("OFCCP"). Each department wishing to fill a vacant position, no matter how high or low in the organizational structure, must complete and submit to the affirmative action office an A-900 form. The A-900 documents the department's efforts to recruit minorities for "underutilized"[1] positions. The department is required to advertise the open position in the appropriate venues, assemble a pool of candidates, and submit the resumes of the candidate pool to the affirmative action office. If a non-minority is selected for the position, the department must justify its failure to choose a minority. If the affirmative action office is not satisfied that the hiring department adequately followed the A-900 process, it may reject the proposed candidate and require the department to start over. A department may obtain a waiver from the A-900 process; however, all waivers must be approved by President Steger.

Plaintiff took his new duties quite seriously and pursued them with vigor. In reviewing the University's affirmative action program, Plaintiff became troubled by what he perceived to be an excessive number of waivers of the A-900 process—some 300 from 1992 to May 1994. In July 1994, Plaintiff authored a memorandum to the Cabinet members entitled "Is there an Affirmative Action Commitment?" In the memorandum, Plaintiff expressed his concern about the number of waivers in the A-900 process and questioned the University's commitment to equal employment opportunities.

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[1] An underutilized position is one that statistically has fewer women and minorities employed than would be expected given the makeup of the overall population.

Plaintiff was particularly concerned about the number of underutilized positions at the University Hospital. Throughout Plaintiff's tenure at the University, the University Hospital was transitioning to become part of what was known as "the Alliance." The Alliance is a health care management group that was taking over the operation of several Cincinnati-based hospitals. Once University Hospital became part of the Alliance, the University would lose the responsibility for the day-to-day operation of the Hospital, although it apparently would still have people who worked at the Hospital who in fact were employees of the University.

Since the Hospital was going to become part of the Alliance, it required a new person to run it. The new position of Senior Executive Officer ("SEO") was created to operate University Hospital. The SEO was to be an Alliance employee who reported directly to the President of the Alliance; however, the University participated in the selection of the SEO. In order to facilitate the hiring of the SEO, a search firm was hired to assemble a pool of candidates. Out of a pool of some 200 candidates, the final choices were reduced to three—an African-American male, a female, and a white male. Eventually, the search committee selected the white male to become the SEO. Plaintiff, himself a member of the search committee, was in agreement with the rest of the committee that the female was under-qualified for the position. However, Plaintiff felt that the African-American male was the best candidate. Plaintiff protested that the selection was tainted because the search firm failed to identify an adequate number of minority candidates in the overall pool. Plaintiff requested that he be in charge of the search for the next two executive level positions to be filled at the Hospital with a goal toward filling them with minorities.

Defendant also protested when Defendant Harrison sought a waiver of the A-900 process to fill the position of Vice Chairman of the Department of Surgery for the College of Medicine. Harrison requested that he be able to hire Dr. James Hurst, a former member of the College of Medicine faculty, without going through the normal processes because of Hurst's unique experience and abilities. Plaintiff requested an opportunity to discuss this waiver with Defendant Steger and again questioned the University's equal opportunity commitment. Steger approved Harrison's request for the A-900 waiver.

While employed at the University, Plaintiff was a member of the President's Advisory Committee on Race Relations and Human Decency ("PACRRHD"). PACRRHD was a committee composed of minority faculty members, deans, and officers whose purpose was to meet and propose to the University President ways in which the University could create and maintain an atmosphere of diversity and minority acceptance. PACRRHD met with Defendant Steger on a regular basis. At one PACRRHD meeting, Plaintiff agreed to be the "point person" for PACRRHD's agenda due to his access to the President, although PACRRHD would maintain its ability to go directly to the President as needed.

Plaintiff met with Defendant Steger on a weekly basis to keep him apprised of the activities of Plaintiff's area of responsibility. Plaintiff also took the opportunity at these meetings to get feedback from Steger regarding his performance. Plaintiff indicated that he never received any significant criticism of his performance at these meetings.

Plaintiff also had two written performance reviews from Steger during his tenure. The reviews themselves are rather general in nature and do not identify any specific criteria by which Plaintiff was evaluated. The first review, dated July 1994, indicates that Steger was pleased overall with Plaintiff's first year performance. Steger complimented Plaintiff on the new hires with which Plaintiff staffed his department and Plaintiff's vision for the future. The only criticism was that Plaintiff apparently implemented ideas and actions without further developing them with Steger.

Plaintiff's second performance review, which is undated, covers Plaintiff's second year of employment at the University. Overall, this review is somewhat more critical of Plaintiff's performance. The review states that Plaintiff handled some problems very well and that he provided leadership in the University's collective bargaining efforts. However, the review also states that Plaintiff needed to develop more teamwork with his colleagues and with Steger, be more inclusive in his decision-making, and build a credibility base for his department. There is some dispute over the importance of this last review. Plaintiff does not attribute any particular significance to this review. On the other hand, Steger testified, although he apparently never communicated this thought to Plaintiff, that had he received such a review from his superior, he would have been quite concerned because the criticisms were personality-based rather than content-based. Plaintiff never voiced any objections to the comments contained in the review.

In any event, in the fall of 1995, Plaintiff came under intense criticism for his performance in what the

parties call [ ] the "925 negotiations." District 925 of the Service Employees International Union ("925") represents the secretarial and support staff of the University. During the fall of 1995, the contract between the University and 925 was up for renewal and renegotiation. A crucial item during the negotiations was tuition remission—how much 925 employees would have to reimburse the University for the cost of tuition waivers granted by the University in the event the employee failed to achieve a certain minimum grade. Eventually, this issue became the final barrier to a settlement between the University and 925—one on which the University was prepared to accept the cost of a strike by 925 employees if 925 did not accept the University's proposal.

On the afternoon of November 14, 1995, Plaintiff Stephanie Echols, the University's representative at the negotiations, and Defendant Steger conferenced to discuss the status of the negotiations. What transpired during this conference is disputed. Steger claims that the parties discussed a proposal from 925 which he rejected. Plaintiff claims that there was no proposal which Steger rejected during that conference. The parties do agree that it was reconfirmed during this conference that the University was willing to accept a strike rather than further compromise on this issue. At the close of the meeting, Steger indicated that he had a dinner engagement but that he could be reached at home later in the event there was movement in the negotiations.

The 925 negotiations, spearheaded by Echols, continued on into the evening of November 14th with Echols contacting Plaintiff several times. Each time, Plaintiff reiterated to Echols that the University was

willing to accept a strike rather than compromise. Finally, around 11:30 p.m., Echols reached a tentative agreement with 925 that she felt fell within the parameters set by the University's Board of Trustees, including the University's position on tuition reimbursement. Echols relayed that information to Plaintiff. Plaintiff, in deference to the late hour, decided not to call Steger and inform him of the settlement at that time. Rather, Plaintiff waited until the next morning to attempt to contact Steger. Plaintiff called Steger at his office at approximately 7:00 a.m. on November 15. However, Steger had already left for a breakfast meeting with the deans of the University. Apparently news of the settlement reached the media, because Steger was informed of the settlement during his breakfast meeting with the deans.

Plaintiff prepared a summary of the proposed settlement for the Board of Trustees' next meeting on November 28, 1995. The Board, who had the final authority to approve the settlement, was displeased with what the summary indicated and demanded to see the full text of the agreement before they approved it. The next scheduled Board meeting was set for December 18, 1995. In the meantime, apparently with Plaintiff's approval, the payroll department began programming its computer systems to adjust for the pay increases and back pay adjustments that were reflected in the proposed settlement. There ensued an exchange of memoranda between the manager of the payroll department and Steger which basically informed Steger that the programming had reached the point of no return and the adjustments would be reflected on the pay checks to be issued December 5, 1995, despite the fact that the Board had yet to approve the settlement. At that point, Steger authorized the payroll department to release the pay

checks as adjusted. The end result of the payroll incident was that the Board, although they were not satisfied with the terms of the proposed settlement, approved it at their December 18, 1995 meeting because they felt they had no choice in the matter once the adjusted payroll had been released. The Board was displeased with Plaintiff's performance during the entire process. Steger was unhappy with Plaintiff's failure to immediately notify him of the proposed settlement.

Two other events of significance occurred during this period. On December 5, 1995, the Plaintiff filed a complaint with the Equal Employment Opportunity Commission alleging that the University was discriminating against him because of his race and his advocacy on behalf of women and minorities. On December 20, 1995, Steger announced at a meeting of his Cabinet members that Plaintiff had filed a discrimination complaint with the EEOC.

Also on December 20, 1995, Plaintiff and Steger met as a matter of their regular routine.[2] During the meeting, Plaintiff and Steger discussed several routine items. In addition, the question of Plaintiff's performance arose and the following exchange ensued:

> JBJ [Plaintiff]: In the Board meeting on Monday, Mr. Keating indicated that it was felt that there was some inappropriate behavior on my part as it relates to the settlement of that contract.

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[2] The Defendants provided a transcription of the meeting, which Steger had taped. Plaintiff does not dispute that this transcription accurately reflects the exact content of the meeting.

JAS [Defendant]: Clearly.

JBJ: Can I have that in writing?

JAS: Certainly.

. . . .

JBJ: Are there any other issues relating to the Human Resource Department and/or my performance that you need to be communicating to me today?

JAS: No, but I will be communicating with you.

JBJ: This being our regularly scheduled meeting, you don't have the information prepared for me at this time.

JAS: That is correct.

JBJ: When might I expect that information?

JAS: Well, it won't be until the first or second week of January, given the Holidays.

On January 9, 1996, Steger wrote a five-page memorandum to Plaintiff outlining deficiencies in Plaintiff's performance. In particular, Steger cited complaints from other University departments regarding the delivery of services from Plaintiff's department to other departments, Plaintiff's unresponsiveness, complaints regarding poor morale among Plaintiff's staff, and not following the same University procedures that Plaintiff enforced against other departments. In addition,

Steger, at some length and detail, criticized Plaintiff's handling of the 925 negotiations.

On January 16, 1996, Plaintiff authored his own lengthy response memorandum to Steger's memorandum in which he disputed the criticisms set forth by Steger. In addition, Plaintiff stated that he was surprised by Steger's "attack" on his performance since he was hearing about Steger's dissatisfaction for the first time. Plaintiff stated that he believed that Steger drafted his memorandum in retaliation for Plaintiff's filing an EEOC complaint and for Plaintiff's criticisms of the University's affirmative action commitment.

On January 17, 1996, Steger sent Plaintiff a memorandum entitled "Termination" which relieved Plaintiff of his duties as VPHRHR, but informing him that he would be paid the balance of his contract. In the memorandum, Steger stated that he was terminating Plaintiff because they had different views of the facts surrounding Plaintiff's performance which made it impossible for Plaintiff to effectively carry out the functions of his office.

On May 22, 1997, Plaintiff filed an Amended Complaint (Doc. No. 7) asserting claims against the Defendants, University of Cincinnati, Joseph A. Steger, and Donald Harrison, asserting violations of Title VII for discrimination and retaliation, claims under 42 U.S.C. § 1983 for violations of Plaintiff's right to equal protection under the Fourteenth Amendment and violations of the Plaintiff's right to free speech under the First Amendment, and claims under 42 U.S.C. §§ 1981, 1985, 1986. Plaintiff also asserted pendent state law claims for violations of Ohio's anti-discrimination law, O.R.C. § 4112.99, and tortious interference with plaintiff's

employment contract. On August 25, 1997, the University filed a motion for summary judgment (Doc. No. 10). On August 26, 1997, Defendants Steger and Harrison filed their motion for summary judgment (Doc. No. 11).

II. The Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The evidence presented on a motion for summary judgment is construed in the light most favorable to the non-moving party, who is given the benefit of all favorable inferences that can be drawn therefrom. United States v. Diebold, Inc., 369 U.S. 654 (1962). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (emphasis in original).

The Court will not grant summary judgment unless it is clear that a trial is unnecessary. The threshold inquiry to determine whether there is a need for trial is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson, 477 U.S. at 250. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Id.

The fact that the weight of the evidence favors the moving party does not authorize a court to grant summary judgment. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 472 (1962). "[T]he issue of material fact required by Rule 56(c) . . . to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or a judge to resolve the parties' differing versions of the truth at trial." First National Bank v. Cities Service Co., 391 U.S. 253, 288-89 (1968).

Moreover, although summary judgment must be used with extreme caution since it operates to deny a litigant his day in court, Smith v. Hudson, 600 F.2d 60, 63 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979), the United States Supreme Court has stated that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). According to the Supreme Court, the standard for granting summary judgment mirrors the standard for a directed verdict, and thus summary judgment is appropriate if the moving party establishes that there is insufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Id. at 323; Anderson, 477 U.S. at 250.

Accordingly, summary judgment is clearly proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322.

Significantly, the Supreme Court also instructs that [ ] "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion" against a party who fails to make that showing with significantly probative evidence. Id.; Anderson, 477 U.S. at 250. Rule 56(e) requires the non-moving party to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Id.

Further, there is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or similar materials negating the opponent's claim. Id. Rule 56(a) and (b) provide that parties may move for summary judgment "with or without supporting affidavits." Accordingly, where the non-moving party will bear the burden of proof at trial on a dispositive issue, summary judgment may be appropriate based solely on the pleadings, depositions, answers to interrogatories, and admissions on file.

III. Analysis

A. The Defendants' Capacities

It is settled that a plaintiff may not obtain retrospective relief in federal court when funds to satisfy the judgment must be paid from the state treasury. Edelman v. Jordan, 415 U.S. 651, 663 (1973); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944). The Eleventh Amendment extends to suits against state officials in their official capacity. Kentucky v. Graham, 473 U.S. 159, 167 (1985).

A plaintiff may obtain retrospective relief against a state in federal court where the state has waived its sovereign immunity. However, the waiver must be stated in "the most express language or by such overwhelming implications from the text as will not leave room for any other reasonable construction." Edelman, 415 U.S. at 673 (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)). However, the State of Ohio has not waived its Eleventh Amendment sovereign immunity. Mackey v. Cleveland State University, 837 F. Supp. 1396, 1403 (N.D. Ohio 1993). A plaintiff may, however, sue a state in federal court for prospective or injunctive relief. Ex Parte Young, 209 U.S. 123 (1908).

Defendants argue that Plaintiff's claims against Defendants Steger and Harrison under 42 U.S.C. §§ 1981, 1983, 1985, and 1986 are barred by Eleventh Amendment sovereign immunity. In his Complaint, Plaintiff states that Defendant Steger is being sued in his individual capacity at all times with respect to the claims for damages and [in] his official capacity [at] all times with respect to his claims [for] equitable relief. Plaintiff also states in his Complaint that Defendant Harrison is being sued at all times in his individual capacity with respect to damages. Accordingly, to the extent that Plaintiff's section 1981, 1983, 1985, and 1986 claims can be interpreted to assert claims for damages against Defendant Steger in his official capacity, the Defendants' motion for summary judgment is well-taken and is **GRANTED.**

An additional matter that should be addressed is Defendant Steger's and Defendant Harrison's individual liability under Title VII. As mentioned, except for Plaintiff's § 1983 claims for equitable relief, Plaintiff states that Defendants Steger and Harrison are being

sued in their individual capacities at all times. However, Title VII does not impose liability on individuals who do not otherwise qualify as employers. Wathen v. General Electric Co., 115 F.3d 400, 405 (6th Cir. 1997). Plaintiff has not alleged or otherwise shown that Defendants Steger and Harrison qualify as employers for purposes of Title VII. Therefore, to the extent that Plaintiff's Complaint can be read to assert Title VII claims against Defendants Steger and Harrison in their individual capacities, Defendants' motion for summary judgment is well-taken and is **GRANTED.**

The Court will address Plaintiff's claims in a different order than their presentation in the Complaint since in some cases the relevant law is applicable to two counts, or analytically it makes more sense for the Court to address the claim at that particular point.

B. Count I - Discrimination & Count IV - § 1981

Count I of the Complaint alleges that the Defendants discriminated against the Plaintiff on the basis of race and national origin in violation of Title VII, 42 U.S.C. § 2000e-2, et seq. Specifically, Plaintiff alleges that Defendants discriminated against him because of his efforts to ensure the University complied with its affirmative action policies and because of his advocacy on behalf of minorities and women. Count IV of the Complaint alleges that the Defendants' violated his right to be free from discrimination and retaliation on the basis of race, and of his promotion of persons not of the Caucasian race, in the making and enforcement of contracts in violation of 42 U.S.C. § 1981.

A plaintiff establishes a prima facie case of discrimination if he presents direct evidence that he was

discriminated against on the basis of race. Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1081 (6th Cir. 1994). Once the plaintiff has produced direct evidence of discrimination, the burden shifts to the defendant to prove it would have taken the same action against the plaintiff without the discriminatory motivation. Id. However, if the Court does not find credible the plaintiff's proffered - evidence of direct discrimination, then the mode of analysis is the McDonnell-Douglas burden shifting framework. Terbovitz v. Fiscal Court of Adair County, 825 F.2d 111, 115 fn. 3 (6th Cir. 1987).

Under the McDonnell-Douglas framework, a plaintiff may establish a prima facie case of discrimination based on circumstantial evidence by showing that: 1) he is a member of a protected class; 2) he suffered adverse employment action; 3) that he was qualified for the job lost or not gained; and 4) that a person not in the protected class replaced him. Id. Once the plaintiff has made out [a] prima facie case of discrimination, the burden shifts to the defendant to proffer legitimate, non-discriminatory reasons for its actions. Id. at 1082. Once the defendant meets this burden, the burden again shifts to the plaintiff to show that the reasons proffered by the defendant are a pretext. Id. At this stage, the plaintiff must produce evidence sufficient from which the jury could reasonably reject the defendant's explanation. Id. at 1083. The McDonnell-Douglas evidentiary formula applies to claims brought under 42 U.S.C. § 1981 as well as claims brought under Title VII. Mitchell v. Toledo Hospital, 964 F.2d 577, 582 (6th Cir. 1992). Therefore, it is appropriate to consider Plaintiff's Title VII claim and § 1981 claim together for purposes of summary judgment. Id.

Plaintiff argues that there is direct evidence that Defendants discriminated against him because of his insistence that the University adhere to the A-900 process. For reasons which will be more fully explained below, the Court finds that Plaintiff's status as director of the University's affirmative action program and A-900 process does not accord him protected status. Under either mode of analysis, Plaintiff must first show that he is a member of a protected class.

There is no dispute that as an African-American male, Plaintiff would be a member of a protected class. However, in this case, Plaintiff postures his protected status, not as a member of a racial minority, but rather as a person who advocates on behalf of women and minorities. Defendants, on the other hand, argue that Title VII does not provide protected status to advocates. Therefore, any actions taken by Plaintiff to ensure that the University followed its affirmative action program were not protected.

The Sixth Circuit has held that an employee's attempts to implement an affirmative action program do not constitute protected activity because Title VII does not require employers to implement affirmative action programs. Holden v. Owens-Illinois, Inc., 793 F.2d 745, 748-49 (6th Cir. 1986). Furthermore, an employee does not receive special status under Title VII merely by dealing with discrimination and affirmative action matters as part of his employment. Id. at 751.

In this case, the evidence shows that the Plaintiff was responsible for the University's affirmative action program. Plaintiff sought to strictly enforce the University's A-900 policy and vigorously opposed waivers and exceptions to that policy. Plaintiff also fought to

ensure that the University developed a pool of candidates for open positions that was adequately represented by women and minorities and protested when he felt that this was not being done. However, Plaintiff [has] not shown that the Defendants engaged in any activity that violated Title VII by excessively waiving the A-900 requirements or by failing to develop an adequate pool of minority candidates for open positions. It is true that Plaintiff protested when the University failed to hire minorities for the positions of Senior Executive Office[r] for University Hospital and for a University Provost position. However, Plaintiff did not protest that the failure to hire these persons was itself a violation of Title VII. Thus, Plaintiff's activities to enforce the A-900 process were not protected by Title VII.

Plaintiff cites Sullivan v. Little Hunting Park, 396 U.S. 229 (1969), and 29 C.F.R. § 1606.1(b) for the proposition that advocates for minority rights are accorded protected status. The Court finds Plaintiff's reliance on these authorities to be misplaced.

First, Plaintiff argues that in Sullivan the Supreme Court held that advocates for minority rights are protected under 42 U.S.C. § 1981. In Sullivan, the plaintiff was the holder of a lease that afforded the lessee the right to use a privately-owned community park. The lessee was also permitted to assign his rights under the lease subject to board approval. Sullivan assigned his rights under the lease to Freeman, an African-American. The board refused to approve the assignment to Freeman because of his race. Sullivan protested this action to the board and the board expelled him from the community. Sullivan filed a complaint for an injunction and damages

pursuant to 42 U.S.C. §§ 1981 and 1982.[3] Sullivan, 396 U.S. at 234-35. The Supreme Court held that § 1982 protected Sullivan's advocacy of a minority's rights and therefore he had standing under § 1982 to maintain the action. Id. at 237.

It is true that the law of Title VII and § 1981 are closely linked and therefore Plaintiff's argument has some initial appeal. However, the Supreme Court's actual analysis in Sullivan centered on § 1982, not § 1981. The Court in fact did not hold that § 1981 protected advocates for minority rights. While an analogy might be drawn between Sullivan and this case, Sullivan is distinguishable because the plaintiff in that case was advocating for an identifiable person against a specific act of discrimination. In this case, Plaintiff has only alleged that he was discriminated against because of his general advocacy on behalf of women and minorities.

Plaintiff's protected status pursuant to 29 C.F.R. § 1606.1(b) is a somewhat different matter. This section provides:

> The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic

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[3] 42 U.S.C. § 1982 provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

> characteristics of a national origin group. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's name is associated with a national origin group . . . .

Plaintiff argues that under this section his participation in PACRRHD affords him protected status because PACRRHD seeks to promote the interests of national origin groups. While the EEOC Guidelines are not controlling authority to this Court, the EEOC's interpretation of Title VII is to be accorded deference, and in any event, provide a helpful source to which the Court may turn for guidance. Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

Plaintiff argues that he was discriminated against because he sought to advance PACRRHD's goals through enforcement of the A-900 process. Thus, that activity was protected by § 1606.1(b). The flaw in Plaintiff's argument is that as Vice President of Human Resources, Plaintiff had a duty independent of his participation in PACRRHD to oversee and implement the A-900 process. As noted, merely enforcing the University's internal affirmative action program does not afford Plaintiff protected status.

Plaintiff has not presented any evidence that demonstrates that he engaged in protected activity outside of his enforcement of the A-900 process or that he was discriminated against for merely belonging to PACRRHD.

The Court finds that Plaintiff was not a member of a protected class either through his efforts to enforce the University's affirmative action program or by his participation in PACRRHD. Thus, Plaintiff has failed to establish the first element of a prima facie case of discrimination under either mode of analysis. Accordingly, Defendants' motion for summary judgment with respect to Counts I and IV of Plaintiff's Complaint is well-taken and is **GRANTED**.

C. Count V – Retaliation

Count V of Plaintiff's Complaint alleges that the Defendants retaliated against him for his enforcement of the A-900 process and for filing an EEOC complaint against the University. As explained above, Plaintiff's participation in the A-900 process does not constitute protected activity. Therefore, the Court will only consider whether Defendants retaliated against Plaintiff for filing an EEOC complaint.

To establish a prima facie case of retaliation in violation of Title VII, the plaintiff must show: 1) that he engaged in protected activity; 2) that the exercise of protected civil rights was known to the defendant; 3) that the defendant took adverse employment action; 4) that there was a causal connection between the protected activity and the adverse employer action. Canitia v. Yellow Freight System, Inc., 903 F.2d 1064, 1066 (6th Cir. 1990). Once the plaintiff has made a prima facie case, the

burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its actions. Id. If the defendant meets this burden of production, the burden shifts back to the plaintiff to show that the reasons proffered by the defendant are a pretext. Id. However, the ultimate burden of persuasion remains with the plaintiff at all times. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993).

Regarding the first element, the plaintiff must have a reasonable good faith belief that he was opposing unlawful employer actions in order to be engaged in protected activity. Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312-13 (6th Cir. 1989); Bigge v. Albertsons, Inc., 894 F.2d 1497, 1501 (11th Cir. 1990). Where the plaintiff's claim of discrimination is insincere and unfounded in fact, the plaintiff did not oppose conduct that is entitled to Title VII's protection. Montiero v. Poole Silver Co., 615 F.2d 4, 9 (5th Cir. 1980). In determining the reasonableness of the plaintiff's belief it is necessary to look first at the existing case law. Drinkwater v. Union Carbide Corp., 904 F.2d 853, 865 (3rd Cir. 1990); Berg v. La Crosse Cooler Co., 612 F.2d 1041, 1043-45 (7th Cir. 1980).

Plaintiff filed his EEOC complaint on December 5, 1995. In the complaint, Plaintiff made the same general allegations of discrimination that he makes in this case—that the University discriminated against him for making internal complaints about hiring decisions and excluded him from participating in strategic planning for University Hospital. There are some general allegations of racial discrimination, but the specific allegations of discrimination relate to Plaintiff's advocacy and his involvement with University Hospital. For the reasons that follow, the Court finds that the Plaintiff could not

have held a reasonable belief that he was opposing unlawful employer action by filing the EEOC complaint.[4]

As noted in Part B, supra, it has been the law in this Circuit for some time that attempts to implement an

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[4] It is important to note here that Plaintiff has made allegations of race discrimination in both his EEOC complaint and his complaint before this Court. Of course, Plaintiff must adduce specific facts of racial discrimination in order to withstand summary judgment. See Anderson, 477 U.S. at 250. The Court's examination of the record before it reveals no evidence whatever that the Defendants discriminated against the Plaintiff because of his race. In fact, Plaintiff does not even argue in his brief that the Defendants discriminated against him on the basis of race.

It is true that to prevail on a Title VII retaliation claim the plaintiff need not prove the allegations of discrimination contained in his EEOC complaint. See, e.g., Meeks v. Computer Associates Intern., 15 F.3d 1013, 1021 (11th Cir. 1994). The plaintiff must only have a reasonable belief that he is being discriminated against. Id. However, the total lack of evidence in the record that would support a claim of racial discrimination supports the Court's determination that Plaintiff did not hold a reasonable belief that he was discriminated against on the basis of race.

Furthermore, there is a strong inference of nondiscrimination when the person who is alleged to have discriminated against the plaintiff is also the same person who hired the plaintiff. See EEOC v. Our Lady of the Resurrection Med. Ctr., 77 F.3d 145, 152 (7th Cir. 1996). Of course, in this case, there is no dispute that Defendant Steger hired Plaintiff, with the Board's approval, and is alleged to have discriminated against Plaintiff. As the Court observed in Our Lady, if Steger wished to discriminate against Plaintiff, he could have refused to hire Plaintiff in the first place. See id. It is incongruous to believe that an employer would hire someone knowing that the person is a member of a racial minority and then discriminate against that person on the basis of race.

affirmative action program that complies with Executive Order 11246 are not protected by Title VII. See Holden v. Owens-Illinois, Inc., 793 F.2d 745, 748-49 (6th Cir. 1986). There is a general presumption in the law that the law is definite and knowable and that every person knows the law. Cheek v. United States, 498 U.S. 192, 199 (1991). Obviously, the size and complexity of today's federal code makes that a difficult task. But here, we are dealing with a person with an extensive background in employee relations. The Court must presume that one of Plaintiff's responsibilities as the VPHRHR was to know and keep abreast of the state of the federal employment laws. His own claim of discrimination by definition falls within his area of expertise. Therefore, it is not unreasonable for the Court to charge the Plaintiff with knowing that making protests regarding internal hiring decisions that perhaps do not meet the mandates of Executive Order 11246, but otherwise do not violate Title VII, are not protected by Title VII. Thus, the Court finds that the Plaintiff could not have reasonably believed he was engaging in protected activity when he filed his EEOC complaint.

There is another reason for finding that the Plaintiff could not have reasonably believed he was engaged in protected activity. It is clear from the cases that employees should not be able to use the EEOC complaint system and Title VII as a shield to protect them from lawful employment action. See Booker, 879 F.2d at 1312; Brown v. Ralston Purina Co., 557 F.2d 570, 572 (6th Cir. 1977); Montiero, 615 F.2d at 8. The Defendants argue, and the Court finds, that Plaintiff filed the EEOC complaint as a protective measure against anticipated negative action following his performance in the 925 negotiations.

The record first shows that Defendant Steger was unhappy with Plaintiff for not immediately informing him that a settlement had been reached with 925. Steger directed a memorandum, dated November 15, 1995, to Plaintiff stating as much.[5] Defendants' Ex. 13. Next, the record indicates that the Plaintiff was aware that preparations were underway to make changes in the payroll system that would reflect the terms of the settlement, even though the Board had not yet approved it. Defendant's Ex. 14. The Board met on November 28, 1995 to discuss the terms of the tentative settlement. Plaintiff was on vacation that week so Stephanie Echols went to the Board meeting in his place. At the Board meeting, the members expressed their displeasure with the terms of the agreement and with Plaintiff's handling of the matter. The Board did not approve the settlement at that meeting.

Plaintiff returned from his vacation on Sunday, December 3, 1995. On the same day, Plaintiff spoke with Echols. Echols informed him of what transpired at the Board meeting and that the members were unhappy. Echols Dep. at 74; Defendants' Ex. 20. Meanwhile, the payroll department manager sent a memorandum, dated November 29, 1995, the day after the Board failed to approve the settlement, notifying Defendant Steger, with

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[5] The memorandum states:

> From now on, when the bargaining session reopens, I want to be called before it is settled.
>
> I was embarrassed this morning at a breakfast with the Deans when they asked me the terms of the 925 settlement. I had to say I did not know they settled—let alone the terms.

a carbon copy to Plaintiff, that the payroll increases were set to be released on December 5, 1995 and were virtually irretrievable.

Also of significance during this time period is the fact that Plaintiff was involved in disciplining one of his own staff members who had previously filed an EEOC complaint against him. The record shows that Najiyyah Cunningham, one of Plaintiff's staff members, filed an EEOC complaint against the Plaintiff alleging age discrimination.[6] Plaintiff suspended Cunningham for three days for disruptive behavior following the filing of her complaint. Plaintiff had been consulting with the University's General Counsel, James Wesner, on how to proceed with the suspension, concerned that any disciplinary action might be perceived as retaliation. Johnson Dep. at 152-60; Defendants' Ex. 16.

Thus, when Plaintiff returned to work on December 4, 1995 he was aware of the following: 1) the President of the University was unhappy with his performance during the 925 negotiations; 2) the Board of Trustees was unhappy with his performance during the 925 negotiations; 3) the Payroll Department, if without his direct approval, then certainly with his knowledge, had begun implementing pay increases based on the tentative settlement with 925; 4) the Board had not yet approved the tentative settlement; 5) the payroll increases were going to be released the next day, December 5, and could not be stopped; 6) EEOC complaints take time to resolve; and, 7) the University was reluctant to discipline

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[6] The record also refers to Cunningham as Najiyyah Duncan. Cunningham filed her EEOC complaint on June 26, 1995. As of November 2, 1995, the complaint was still pending resolution. Defendants' Exs. 8, 16.

individuals who had filed EEOC complaints. Plaintiff filed his EEOC complaint on December 5, 1995.

Plaintiff testified that he had no reason to think that the University was about to take any sort of adverse action against him at the time he filed his EEOC complaint.[7] Johnson Dep. at 310. In fact, Plaintiff appears to indicate that he was not aware that the Board was upset with his performance during the 925 negotiations until the December 18, 1995 Board meeting, which Plaintiff attended. See Defendants' Ex. 23 (Transcript of Plaintiff's December 20, 1995 meeting with Defendant Steger) ("In the Board meeting on Monday, Mr. Keating indicated that it was felt that there was some inappropriate behavior on my part as it relates to the settlement of that contract.").

However, in the face of the undisputed facts listed above, no reasonable person could find that Plaintiff did not anticipate on December 4 that he might be in trouble because he had initiated a potentially catastrophic chain of events. No reasonable person could believe that Plaintiff could rise to a position of great responsibility at a large university, and yet be completely unaware of the ramifications of his actions or how his superiors might react to those ramifications. The only reasonable conclusion that can be drawn from this evidence is that Plaintiff knew that he was already under fire, and that he was going to be in further trouble because of the payroll situation, so he filed a complaint with the EEOC to

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[7] In his EEOC complaint, Plaintiff stated that the earliest and latest date of discrimination was November 9, 1995. As Defendants point out, it is significant that Plaintiff cannot recall exactly what discriminatory act occurred on that day. Johnson Dep. at 232-33.

forestall any disciplinary action the University might take against him. Thus, the Court finds that Plaintiff did not file the EEOC complaint with a good faith belief that he was being discriminated against.

In summary, the Court finds that the Plaintiff has failed to make out the first element of a prima facie case of discrimination because he was not engaged in protected activity. Accordingly, the Court finds that the Defendants' motion for summary judgment with respect to Count V of Plaintiff's Complaint is well-taken and is **GRANTED**.

D. § 1983 Claim – Fourteenth Amendment

Count III of Plaintiff's Complaint alleges that Defendants' conduct violated Plaintiff's right to equal protection under the Fourteenth Amendment, in violation of 42 U.S.C. § 1983. The showing a plaintiff must make to recover on a disparate treatment claim mirrors the showing that must be made to recover under § 1983. Gutzwiller v. Fenik, 860 F.2d 1317, 1325 (6th Cir. 1988). Under both statutes, the plaintiff must establish that he was the victim of purposeful discrimination. Id. The plaintiff must demonstrate that the adverse employment action would not have occurred but for the plaintiff's protected status. Id.

Here again, Plaintiff claims to have been discriminated against because of his advocacy on behalf of women and minorities. Again, Plaintiff asserts that his advocacy was manifested through his insistence that the University comply with the A-900 process. Assuming arguendo that Defendants did discriminate against the plaintiff on this basis, summary judgment is still appropriate for the Defendants because the Court has

already held that advocacy through the University's affirmative action program does not place Plaintiff in a protected class. Accordingly, Defendants' motion for summary judgment with respect to Count III of Plaintiff's Complaint is well-taken and is **GRANTED.**

A. § 1983 Claim – First Amendment

Count VI of Plaintiff's complaint alleges that the Defendants retaliated against him for speaking out about a matter of public concern. Plaintiff alleges that such conduct violated his First Amendment right to free speech as secured by 42 U.S.C. § 1983.

In order to make out a prima facie case of retaliation for speaking out on a matter of public concern, the plaintiff must show that: 1) he was engaged in constitutionally protected activity; and, 2) that such activity was a substantial or motivating factor in the determination to discharge him. Stern v. Shouldice, 706 F.2d 742, 747 (6th Cir. 1983). Once the plaintiff establishes a prima facie case of retaliation, the burden shifts to the defendant to show that it would have taken the same action even in the absence of the protected activity. Id.

The speech of a public employee is protected if it is a matter of public concern and the employer has no overriding state interest in efficient public service that would be undermined by plaintiff's speech. Pickering v. Board of Education, 391 U.S. 563, 568 (1968); Meyers v. City of Cincinnati, 934 F.2d 726, 729 (6th Cir. 1991). Whether the plaintiff's speech is a matter of public concern is a question of law to be decided by the Court. Dambrot v. Central Michigan University, 55 F.3d 1177, 1186 (6th Cir. 1995). Statements regarding the

implementation of an affirmative action program are a matter of public concern. Meyers, 976 F.2d at 729.

In determining whether the State has an overriding interest in efficiency, the Court should consider whether: 1) the employee's comments meaningfully interfere with the performance of his duties; 2) the employee's comments create disharmony among his co-workers; and, 3) the employee's comments undercut an immediate supervisor's discipline over the employee or destroy the relationship of loyalty and trust required of confidential employees. Pickering, 391 U.S. at 572-73.

In this case, there is no dispute that Plaintiff's speech revolved around his persistent criticism of the University's affirmative action program and insistence that the University comply with the A-900 procedures. Thus, the Court finds that Plaintiff's speech was a matter of public concern.

Next, the Court must determine whether the State has an overriding concern in public efficiency that outweighs the Plaintiff's right to engage in the speech. First, the record is clear that Plaintiff's "speech," at least as it concerned his administration of the A-900 process, created difficulties among the various departments at the University. Dale McGirr testified that Johnson's department did not complete personnel transactions and reclassification and equity studies in a timely fashion. The record also shows that Plaintiff held up the filling of a relatively low-level supervisory position for approximately nine months while he and the hiring manager fought over whether the A-900 process was properly completed. The position was only filled after the manager asked Defendant Steger to intervene. Indeed, Plaintiff acknowledged in his "Is there an Affirmative

Action Commitment?" memo that the Cabinet members were likely experiencing delays in hiring which were attributable to him. Additionally, Defendant Steger testified that Plaintiff's memorandum upset many of the Cabinet members because they felt that their commitment to diversity was beyond reproach.

What the record reveals, then, is that the Plaintiff's "speech" was causing a tremendous disruption in the University's ability to deliver its services. Plaintiff's administration of the A-900 process was undermining the efficient operation of the University. Therefore, the Court finds that the Plaintiff was not engaged in protected activity for purposes of the First Amendment. Accordingly, Defendants' motion for summary judgment with respect to Count VI of the Complaint is well-taken and is **GRANTED**.

B. Count VII - § 1985(3) Claim

Count VII of the Complaint alleges that Defendant Harrison conspired with unnamed others to deprive Plaintiff of his right to equal protection under the law in violation of 42 U.S.C. § 1985(3). More specifically, the Complaint alleges that Defendant Harrison and unnamed employees of the Health Alliance conspired to remove Plaintiff from having any involvement or authority over human resource issues regarding the Alliance.

To establish a claim under § 1985(3), the plaintiff must show: 1) a conspiracy involving two or more persons; 2) for the purpose of depriving, directly or indirectly, a person or class of persons the equal protection of the laws; 3) an act in furtherance of the conspiracy; 4) which causes the injury to the person or property, or deprivation of any right or privilege of a

citizen of the United States. Johnson v. Hills & Dales Gen. Hosp., 40 F.3d 837, 839 (6th Cir. 1994). Additionally, the plaintiff must establish that the conspiracy was based on class-based animus. Id.

In his reply brief, Defendant Harrison argues that the Court should grant summary judgment in his favor because Plaintiff has failed to establish any of the above elements. The Court must agree. The Court's examination of the record before it fails to reveal any evidence that Defendant Harrison conspired with others to deprive him of equal protection of the laws. Indeed, in his memorandum in opposition to the Defendant's summary judgment motion, Plaintiff entirely fails to address this claim or even suggest any evidence that would support it.

Accordingly, Defendant Harrison's motion for summary judgment with respect to Count VII of Plaintiff's complaint against Defendant in his individual capacity is well-taken and is **GRANTED.**

G. Count VIII - § 1986 Claim

Count VIII of Plaintiff's complaint alleges that Defendant Steger failed or refused to prevent or aid in preventing the commission of a conspiracy to deprive Plaintiff of his right to equal protection under the law in violation of 42 U.S.C. § 1986. However, where a Court finds that there had been no violation of 42 U.S.C. § 1985, there can be no violation of 42 U.S.C. § 1986. Browder v. Tipton, 630 F.2d 1149, 1155 (6th Cir. 1980). The Court has already ruled that Plaintiff failed to establish a conspiracy for purposes of 42 U.S.C. § 1985. Accordingly, Defendant Steger's motion for summary judgment with respect to Count VIII of Plaintiff's complaint against

Defendant Steger in his individual capacity is well-taken and is **GRANTED.**

H. Plaintiff's State Law Claims

Counts II, IX, and X allege claims under the law of the state of Ohio. When a court has dismissed all the claims over which it has jurisdiction, it may decline to exercise jurisdiction over any pendent state law claims pursuant to 28 U.S.C. § 1367(c)(2). Hankins v. The Gap, Inc., 84 F.3d 797, 802-03 (6th Cir. 1996). Accordingly, Defendants' motion for summary judgment with respect to these Counts is deemed **MOOT** and Plaintiff's state law claims are **DISMISSED WITHOUT PREJUDICE.**

I. Plaintiff's Motion to File Sur-reply

Plaintiff has moved to file a sur-reply to Defendants' reply briefs in support of their motions for summary judgment. Plaintiff argues that in their reply briefs Defendants addressed issue [sic] not raised in their original summary judgment memoranda and therefore it is necessary to file a sur-reply. However, the Court's review of Plaintiff's memorandum and the evidence supporting his motion cover much of the same ground as his memorandum in opposition to Defendants' summary judgment motions, and in any event, do not assist the Court's analysis of the issues before it in any meaningful way. Accordingly, Plaintiff's Motion to File Sur-reply is deemed **MOOT.**

Conclusion

In summary, the Defendants' motions for summary judgment with respect to Counts I, III, IV, V, VI, VII, and VIII are well-taken and are **GRANTED.** The

Defendants' motions for summary judgment with respect to Counts II, IX, and X are deemed **MOOT** and those claims are **DISMISSED WITHOUT PREJUDICE.** Plaintiff's Motion to File Sur-reply is deemed **MOOT.**

IT IS SO ORDERED.

December 15, 1997
Date

/s/ Sandra S. Beckwith

Sandra S. Beckwith
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN B. JOHNSON,	:	No. C-1-96-727
PLAINTIFF,	:	JUDGE BECKWITH
-VS.-	:	
UNIVERSITY OF CINCINNATI et al.,	:	AMENDED COMPLAINT
	:	AND JURY DEMAND
DEFENDANTS.		

Now comes Plaintiff, John B. Johnson, who for his amended complaint against the Defendants, the University of Cincinnati ("University"), Joseph A. Steger, and Donald C. Harrison (collectively "Defendants"), states as follows:

I. PRELIMINARY STATEMENT

1. This is a civil rights action that alleges that Defendants conspired to discriminate against Plaintiff with respect to the terms and conditions of his employment. Defendants discriminated against Plaintiff, as Vice President of Human Resources and Human Relations at the University of Cincinnati, because of his advocacy on behalf of protected minorities and his support of policies and programs that promoted cultural diversity.

Defendants subsequently retaliated against Plaintiff by terminating his employment because he had protested his discriminatory treatment and because he had filed an Equal Employment Opportunity Commission ("EEOC") charge of discrimination. Plaintiff seeks relief including reinstatement, back pay, compensatory damages, punitive damages, costs, and reasonable attorney's fees.

II. JURISDICTION

2. Jurisdiction of this Court is invoked pursuant to 42 U.S.C. § 2000[e]-5(f), 28 U.S.C. §§ 1331 and 1343(3)-(4) and 28 U.S.C. § 1367. Federal jurisdiction is appropriate in this instance to secure protection and to redress deprivations of rights conferred by: (1) Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, which, among other things, prohibits discrimination in the terms, conditions, and opportunities for employment on the basis of race and national origin and prohibits retaliation for participation in protected activities; (2) 42 U.S.C. § 1981, which forbids intentional discrimination based upon race in the formation, performance, modification, and termination of contracts; (3) 42 U.S.C. § 1983, which provides remedies for violations of guarantees of free speech on matters of public concern under the First Amendment of the United States Constitution and which provides remedies for violations of equal protection of the laws under the Fourteenth Amendment of the United States Constitution; (4) 42 U.S.C. § 1985(3), which prohibits conspiracies to deprive any person or class of persons of the equal protection and privileges under the laws; (5) 42 U.S.C. § 1986, which imposes liability upon persons who have power to prevent or aid in preventing the commission of illegal conspiracies to deprive persons of their civil rights, but who refuse or fail to do so; (6) Ohio

Rev. Code § 4112.99, which provides for relief from discrimination on the basis of race and retaliation; and (7) the Ohio common law.

3. This Court may assume supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367 on the grounds that said claims arise out of the same nucleus of operative facts as the federal claims.

4. All of the actions complained of herein occurred within [the] Southern District of Ohio; accordingly, venue with this Court is appropriate.

III. ADMINISTRATIVE HISTORY

5. On or about December 5, 1995, Plaintiff filed EEOC charge number 22190156, asserting that, for discriminatory reasons, he had been prevented from performing his assigned duties and that he had been retaliated against for having registered complaints about disparities in hiring and pay for minority employees at the University and the selection process for the chief operations officer of University Hospital.

6. On or about December 6, 1996, Plaintiff received a Notice of Right to Sue from the United States Department of Justice in connection with Charge No. 221960156 [sic]. *See* Exhibit 1, attached hereto.

IV. PARTIES

7. Plaintiff is an African-American citizen of the United States who resides in Cincinnati, Ohio. From August 1, 1993, to January 17, 1996, Plaintiff was

employed as Vice President of Human Resources and Relations ("VPHR-HR") by the University.

8. Defendant, the University is an institution of higher education in the state of Ohio. The University is a government contractor subject to Executive Order No. 11246. The University has approximately nine thousand employees and is engaged in an industry affecting commerce. Thus, the University qualifies as an employer within the purview of Title VII. The University is named herein as a party in connection with plaintiff's claims of discrimination and retaliation asserted pursuant to Title VII.

9. At all times relevant hereto, Defendant Steger was the President of the University. Defendant Steger is sued in his individual capacity with respect to damages and in his official capacity with respect to Plaintiff's claims for equitable injunctive relief.

10. At all times relevant hereto, Defendant Harrison was the Senior Vice President and Provost of University Hospital. Defendant Harrison is sued in his individual capacity with respect to damages.

V. STATEMENT OF CLAIMS

11. On August 1, 1993, Plaintiff was employed as VPHR-HR by the University pursuant to a three-year renewable contract.

12. Plaintiff's position was newly developed in 1989 ostensibly to create a climate at the University free of racism. According to Defendant Steger, a corollary of this purpose was the increased representation of African-Americans in faculty and staff positions at the University.

Accordingly, the VPHR-HR was charged with the responsibility of developing and implementing programs, activities, and policies necessary to make the "University a place of respected diversity and free from racism in a place known for respect of individuals."

13. In his capacity as VPHR-HR, Plaintiff was the University administrator who had primary responsibility for human resource activities on both University campuses: the East Campus (the undergraduate and graduate schools of the University) and the West Campus (the College of Medicine and University Hospital). In that position, Plaintiff reported directly to the Defendant Steger, served as a member of the President's Cabinet, and administered a department that had approximately one hundred employees. Plaintiff's duties also entailed developing, implementing, and overseeing all policies, procedures, programs, and activities that affected the quality of human relations. He also managed human resources for all administrators, students, faculty, and staff and he served as the chief executive officer for the personnel, affirmative action, and ombudsmen offices. In the course of performing his duties in the area of affirmative action, Plaintiff associated with foreign national-origin groups and races and sought to promote the interests of foreign national-origin groups and races.

14. Shortly after he began his duties, Plaintiff noted shortcomings in the University's compliance with equal-employment and affirmative-action policies. By way of example, in or about July, 1994, Plaintiff expressed his concern about an excessive number of waiver requests from the "Conciliation Agreement of 1978." That agreement between the University and the Office of Civil Rights, United States Department of

Health, Education and Welfare was intended to ensure that qualified minorities and women were fairly represented in recruiting and hiring for underutilized [faculty] and staff positions at the University. In a communication to the President's Cabinet, Plaintiff noted that during the period from 1992 through May 1994, more than three hundred requests for waivers from affirmative-action policies had been approved. Plaintiff questioned whether the number of waivers contributed to the underutilization of qualified minorit[ies] and women in various positions at the University.

15. Plaintiff further questioned the University's practice of disproportionately increasing the number of women and minorities in job clusters in low-level, low-salary University positions, particularly at the University Hospital.

16. Plaintiff also criticized the process by which the University sought to fill the vacancy for the position of chief operations officer of University Hospital. A search firm engaged by the University was instructed "to be particularly attentive to seek women and minority candidates" for the position. Of the approximately two hundred resumes submitted for the position, the search firm identified only one African-American male and one female (white) as potential qualified candidates. Plaintiff objected that the search process had been inadequate and had failed to produce qualified minorities and women to be considered for the position.

17. As a further expression of his concern, Plaintiff urged the University to target its recruitment to better attract qualified minority candidates for executive-level positions at the West Campus. He also supported the appointment of the African-American candidate to the

chief executive position of University Hospital over the appointment of the white male candidate who ultimately was selected for the position.

18. After voicing those concerns, Plaintiff experienced increasing resistance to his authority and involvement in the personnel policies and decisions on the West Campus.

19. During this same time, from 1994-1995, the University was negotiating and planning University Hospital's association in the Alliance. The Alliance is a private, non-profit corporation with a single board of directors vested with management control over Jewish, Christ, St. Luke, and University hospitals. This period was critical at University Hospital in terms of developing and implementing human resource policies in as much as the University's obligation with the Alliance had a potential impact on all West Campus employees.

20. Following, and because of, Plaintiff's criticisms of the University's compliance with its affirmative-action and equal-employment obligations, Defendant Harrison, acting under color of state law and outside the scope of his official authority, conspired with persons employed in the Alliance with purpose to deprive Plaintiff of the equal protection of the laws by pursuing a course of dealing with Plaintiff that was calculated to effectively remove him from actual involvement or authority in human resource planning affecting University Hospital's participation in the Alliance. Harrison and his coconspirators sought to circumvent affirmative-action policies and equal-opportunity considerations to which the University was publicly and lawfully committed.

21. Plaintiff protested to Defendant Steger that Defendant Harrison and others were excluding him from decisions and policies affecting the West Campus and the Alliance. Defendant Steger knew that Defendant Harrison, in agreement with individuals employed by the Alliance, had limited Plaintiff's authority with respect to the Alliance because of Plaintiff's support of affirmative-action policies and minority hires. Nevertheless, Defendant Steger failed or refused to exercise his authority to prevent further reduction of Plaintiff's essential job duties.

22. In the fall of 1995, Plaintiff continued to battle with Defendants in connection with the implementation and enforcement of affirmative-action policies and practices governing University Hospital. By way of example, in or about September 1995, Plaintiff wrote to Defendant Steger to protest a personnel action in which Defendant Steger consented to waive affirmative-action procedures governing a faculty position in the College of Medicine. Plaintiff noted that the appointment was accomplished without compliance with University's express equal-opportunity procedures and policies. The personnel appointment approved by Defendant Harrison circumvented the University's requirement that a vacancy for an appointment be widely advertised so that an open search and recruitment effort could be initiated.

23. In or about November 1995, Plaintiff again wrote to Defendant Steger concerning the College of Medicine, affirmative-action waiver and the fact that the chief operations officer of the hospital was unwilling to discuss ongoing Alliance human-relations strategies and developments. Defendant Steger advised Plaintiff that after human resources strategies had been developed, he

would be permitted to comment on those strategies, but that the affirmative-action waiver matter was closed.

24. On or about December 5, 1995, as a consequence of his diminished responsibilities and authority as VPHR-HR, Plaintiff filed a charge of discrimination with the EEOC. In his administrative charge, Plaintiff asserted that the University had prevented him from performing his assigned duties on both East and West campuses. He further asserted that the terms and conditions of his employment had been adversely affected by reason of his complaints concerning the selection process for the hospital's chief operations officer position and his complaints concerning disparities in hiring and pay for minority employees, particularly at the West Campus.

25. In December 1995, Plaintiff asked Defendant Steger to clarify Plaintiff's role concerning University Hospital and to assess the quality of the job being done by the office of human resources and human relations under Plaintiff's management. In response, Defendant Steger issued a memorandum to Plaintiff in which Defendant Steger broadly, unfairly, and inaccurately criticized Plaintiff's performance and maliciously attacked Plaintiff's professional and personal character.

26. Defendant Steger's written assault on Plaintiff was an act of retaliation against Plaintiff for Plaintiff attempting to gain University's compliance with affirmative-action policies and for Plaintiff filing the EEOC discrimination charge.

27. On January 17, 1996, Defendant Steger informed Plaintiff that he was being immediately removed from his position as VPHR-HR.

28. The termination of Plaintiff's employment by Defendant Steger and the University was committed with malice and with reckless indifference to Plaintiff's federally protected rights. Plaintiff's termination also was committed in retaliation for Plaintiff criticizing Defendant's equal-employment and affirmative-action practices at the University and Alliance and for Plaintiff filing an EEOC discrimination charge.

29. At the time Defendant Steger notified Plaintiff of the termination of his contract, the constitutional right of a public employee to be free from retaliation on account of his or her comment on matters of public concern was clearly established and well known by any reasonable college administrator.

30. As a direct and proximate result of Defendants' discrimination and retaliation, Plaintiff was denied the full benefit and value of his contract as well as equal opportunity for employment at the University[.]

31. As further direct and proximate results of Defendants' discriminatory and retaliatory conduct, Plaintiff has suffered and will continue to suffer emotional distress, damage to his profession[al] reputation, and substantial loss of earnings and benefits[.]

STATEMENT OF CLAIMS

COUNT I

32. Plaintiff reiterates and incorporates by reference paragraphs one through thirty-one.

33. Defendants' conduct constituted a violation of Plaintiff's rights to be free from discrimination in the terms, conditions, and opportunities for employment on account of race and national origin in violation of Title VII, 42 U.S.C. § 2000[e]-(2) *et seq.*

COUNT II

34. Plaintiff reiterates and incorporates by reference paragraphs one through thirty-three.

35. Defendants' conduct constituted a violation of Plaintiff's right to be free from employment discrimination on account of race and to be free from retaliation for engaging in protected activities as secured by Ohio Rev. Code § 4112.99.

COUNT III

36. Plaintiff reiterates and incorporates by reference paragraphs one through thirty-five.

37. Defendants' conduct under color of state law constituted a violation of Plaintiff's rights to equal protection of the laws under the Fourteenth Amendment of the United States Constitution as secured by 42 U.S.C. § 1983.

COUNT IV

38. Plaintiff reiterates and incorporates by reference Paragraphs one through thirty-seven.

39. Defendants' conduct constituted a violation of Plaintiff's right to be free from discrimination and retaliation on account of his race and his association with, and promotion of, persons not of the Caucasian race in the making and enforcement of contracts as provided by 42 U.S.C. § 1981.

COUNT V

40. Plaintiff reiterates and incorporates by reference paragraphs one through thirty-nine.

41. Defendants' conduct constituted a violation of Plaintiff's right to be free from acts of retaliation for making charges and participating in enforcement proceedings as secured by Title VII, 42 U.S.C. § 2000[e]-(3).

COUNT VI

42. Plaintiff reiterates and incorporates by reference Paragraphs one through forty-one.

43. Defendants' conduct under color of state law constituted a violation of Plaintiff's rights to be free from retaliation in public employment for the exercise of protected speech on matters of public concern under the First Amendment to the United States Constitution as secured by 42 U.S.C. § 1983.

COUNT VII

44. Plaintiff reiterates and incorporates by reference Paragraphs one through forty-three.

45. The conduct of Defendant Harrison and others constituted a conspiracy to deprive Plaintiff of his rights to equal protection under the law in violation of 42 U.S.C. § 1985(3).

COUNT VIII

46. Plaintiff reiterates and incorporates by reference Paragraphs one through forty-five.

47. Defendant Steger's conduct in failing or refusing to prevent or aid in preventing the commission of a conspiracy to deprive Plaintiff of his rights to equal protection under the law constituted a violation of 42 U.S.C. § 1986.

COUNT IX

48. Plaintiff reiterates and incorporates by reference Paragraphs one through forty-seven.

49. The actions of Defendants Steger and Harrison in limiting Plaintiff's duties and then terminating him from employment constituted a tortious interference with Plaintiff's employment contract with the University as prohibited by the common law of the state of Ohio.

COUNT X

50. Plaintiff reiterates and incorporates by reference Paragraphs one through forty-nine.

51. The actions of Defendants Steger and Harrison in limiting Plaintiff's duties and terminating him from employment constituted a tortious interference with Plaintiff's business relations as prohibited by the common law of the state of Ohio.

WHEREFORE, Plaintiff demands judgment against Defendants University, Steger, and Harrison, and each of them, jointly and sever[al]ly, as follows:

1. An order directing Defendants to reinstate Plaintiff to the position of Vice President of Human Resources and Human Relations; or in the alternative, to award Plaintiff front pay;

2. An award of compensatory damages for all current and future economic and non-economic losses consistent with the evidence at trial;

3. An award of punitive damages in an amount consistent with the law and the evidence at trial;

4. An award of Plaintiff's costs and reasonable attorney's fees and for all other equitable [and] legal relief to which Plaintiff may be entitled in the premises.

Respectfully submitted,

SIRKIN, PINALES, MEZIBOV &
SCHWARTZ

/s/ Ted Willis
MARC D. MEZIBOV
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Attorneys for Plaintiff

JURY DEMAND

Plaintiff hereby demands that all issues of fact in the foregoing Complaint be tried to a jury.

/s/ Marc Mezibov/TLW
MARC D. MEZIBOV
(Ohio Bar No. 0019316)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing [Amended Complaint] has been served upon John B. Pinney, Trial Attorney for Defendants, Graydon, Head & Ritchie, 1900 Fifth Third Center, P.O. Box 6464, Cincinnati, OH 45201-6464, by first-class United States Mail, postage prepaid, this 19th day of ~~January~~ May 1997.

/s/ Marc Mezibov/TLW
MARC D. MEZIBOV
(Ohio Bar No. 0019316)

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN B. JOHNSON,	:	No. C-1-96-727
Plaintiff,	:	BECKWITH, S., Judge
-vs.-	:	
UNIVERSITY OF CINCINNATI, et al.,	:	[Filed: Oct. 21, 1997]
Defendants.	:	

PLAINTIFF, JOHN JOHNSON'S, AMENDED MEMORANDUM IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT BY DEFENDANTS, UNIVERSITY OF CINCINNATI, JOSEPH STEGER, AND DONALD HARRISON

I. INTRODUCTION

Plaintiff, John Johnson, is the former vice president of human resources and human relations (VPHRHR) at the University of Cincinnati (UC). Defendant Joseph Steger is president of the University of Cincinnati, and Defendant Donald Harrison is vice president and provost for health affairs at UC. This case

stems from Mr. Johnson's efforts to vindicate the University's official affirmative-action policies as required by federal regulations of the Office of Federal Contract Compliance and Programs (OFCCP). Mr. Johnson was a forceful and vocal proponent of these policies. Nevertheless, Mr. Johnson was prevented from fulfilling his responsibility with respect to these policies when the university's administration effectively marginalized his authority. In response, Mr. Johnson filed a complaint of discrimination with the Equal Employment Opportunity Commission (EEOC). Several weeks later, while the university was being audited for the second time in twenty years by the OFCCP for the very affirmative-action violations that Mr. Johnson had cited, Defendants summarily removed Mr. Johnson from his position.

Because of his wrongful termination, Mr. Johnson sued UC, Joseph Steger, and Donald Harrison for discrimination and retaliation. The parties have completed a portion of discovery, and Defendants have moved for summary judgment. The issue for the purposes of this memorandum, reduced to its essence, is whether Defendants can escape retaliation against Mr. Johnson for speaking out on matters of public interest and for having opposed Defendants' discriminatory action. As the following analysis will show, Defendants cannot escape liability and Mr. Johnson must prevail on his memorandum in opposition to summary judgment.

II. SUMMARY OF ARGUMENT

DISCRIMINATION: TITLE VII/§ 1981/EQUAL PROTECTION

The Summary Judgment Standard in Discrimination Analysis

To analyze a discrimination claim, a court employs the same inquiry under Title VII as it does under 42 U.S.C. § 1981, and under the Equal Protection Clause. *Gutzwiller v. Fenik*, 860 F.2d 1317, 1325 (6th Cir. 1988).

When the plaintiff presents direct evidence of discrimination, the court and factfinder are relieved of the necessity of engaging in the *McDonnell Douglas*, inferential, shifting burden analysis. *Christopher v. Stouder Hosp.*, 936 F.2d [870, 879 (6th Cir. 1991)]. To overcome summary judgment in a direct evidence case, the plaintiff merely has to present evidence that he is in a protected class and that he was terminated, at least in part, because of that protected status. *LaPointe [v. United Autoworkers Local 600,* 8 F.3d 376,] 379-80 (6th Cir. 1993); 42 U.S.C. § 2000e-2(m).

Mr. Johnson's Protected Status: Advocate for Minority Rights

42 U.S.C. § 1981 and Title VII protect persons who advocate the rights of minorities or persons who associate with groups that promote the interests of minorities. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 237, 90 S. Ct. 400, 404 (1969) (§ 1981); 29 C.F.R. §1606.1(b) (Title VII). In this case, Mr. Johnson was head of UC's department of human resources, which included the

affirmative action office. In that role, he was an "instrument of change." As such, he was an advocate of minority rights, and his activities were protected under *Sullivan v. Little Hunting Park* and 29 C.F.R. § 1606.1(b).

Direct Evidence That Mr. Johnson Was Terminated Because of His Protected Status

Two of Mr. Johnson's outspoken critics were Dr. Harrison and Dr. Hutton. The complaints of both centered around Mr. Johnson's reluctance to approve waivers for A-900 forms, which were forms used to monitor compliance with OFCCP regulations. Dr. Steger, as the decisionmaker in Mr. Johnson's termination, solicited opinions from Drs. Harrison and Hutton, and those two were motivated with an illegal animus against Mr. Johnson. Under *Price Waterhouse*, that is direct evidence of discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. [228,] 256, 109 S.Ct. [1775,] 1794 [(1989)].

McDonnell Douglas *Shifting Burden Analysis*

The alternative method of overcoming summary judgment is by employing the *McDonnell Douglas* shifting burden analysis. *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973).

Mr. Johnson's Prima Facie Case

Protected Class: Advocate for Minority Rights

Mr. Johnson was an advocate for minority rights at UC. Under *Sullivan v. Little Hunting Park*, 396 U.S. at 237, 90 S. Ct. at 404 and under 29 C.F.R. §1606.1(b), his activities in that respect were protected conduct.

Mr. Johnson Suffered Adverse Employment Action

Dr. Steger stripped Mr. Johnson of all his responsibilities and his title. As such, Mr. Johnson suffered an adverse employment action. 42 U.S.C. § 2000e-2(a)(1)-(2).

Mr. Johnson Was Qualified For His Position

There is no dispute that Mr. Johnson was qualified for his position.

The Fourth Prong: Replaced by Nonprotected [C]lass / Less Favorable Treatment

Mr. Johnson Was Replaced By Person Out of His Protected Class

Dr. Steger replaced Mr. Johnson as the executive at the cabinet level who was in charge of affirmative action. Because Dr. Steger is not a member of the advocacy class, Mr. Johnson has satisfied the fourth prong of the prima facie case.

Mr. Johnson was Treated Less Favorably than Members Out of the Protected Class

The sixth circuit has held that to satisfy the fourth prong of the prima facie case, the plaintiff need only show that persons who were not in the protected class were treated more favorably. *Mitchell v. Toledo Hosp.*, 964 F.2d [577,] 582 [(6th Cir. 1992)]. In this case, Dr. Steger identified seventeen persons who had left cabinet level positions involuntarily since he had come to UC. In each instance, the person leaving had reached a "gentleman's agreement" with Steger before he left. Mr. Johnson, by

contrast, was terminated and Dr. Steger ordered him to leave his office the next day.

Position Shuffling: The Replacement Ruse

Defendants "must not be allowed to get around Title VII, or the *McDonnell Douglas* formula, by fractionating an employee's job." *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1397 (7th Cir. 1997). When Dr. Steger fired Mr. Johnson, Dr. Steger became the cabinet-level executive in charge of affirmative action. Dr. Steger, however, does not do anything related to affirmative action and does not know anything about affirmative action. That ruse leaves Dr. Steger as a titular leader and Mr. Johnson's replacement.

Defendants' Proffered Explanation

Under *McDonnell Douglas*, after the plaintiff presents a prima facie case, the defendant offers a purported non-discriminatory explanation. *St. Mary's Honor Center v. Hicks*, [509 U.S. 502, 510-11,] 113 S. Ct. 2742, 2749 (1993).

Dr. Steger's Mendacity

If the defendants' proffered explanation creates a "suspicion of mendacity" by the defendant, the combination of the *prima facie* case and the suspicion of mendacity is sufficient for the jury to draw an inference of pretext and of discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. at 511, 113 S. Ct. at 2749. In this case, Dr. [Steger] stated that two of the reasons that he terminated Mr. Johnson were "unauthorized purchases" for a search firm and improper "moving expenses" for generalists. The search firm and moving expenses,

however, were not issues that could have, or should have, had anything to do with Mr. Johnson's termination.

Plaintiff's Evidence of Pretext

Even if Mr. Johnson had not presented evidence of mendacity, there is sufficient evidence of pretext to escape summary judgment. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994); *Barnhart,* 12 F.3d [1382,] 1390 (6th Cir. 1993).

Mr. Johnson Did Not Violate UC's Moving Policy

Mr. McGirr, whose office enforced the moving policy, said he did not raise anything with Dr. Steger "about any improper conduct by Mr. Johnson relating to those moving expenses."

Mr. Johnson Did Not Make an Unauthorized Purchase

Mr. McGirr also testified that the moving expenditure "would be no reason for [him] to raise an issue about John Johnson's competency to Dr. Steger."

Delays in HR Services were Caused by UC's Resistance to OFCCP Mandated Procedures

One of the core issues in this dispute centered around one main point: A-900 forms. Because UC was a federal contractor, it was required to maintain certain OFCCP mandated affirmative-action requirements. 41 C.F.R. § 60-1.1 *et seq.* UC's failure to meet those requirements led to the 1978 OFCCP Conciliation Agreement and the implementation of the A-900 form. At

UC, however, there was widespread resistance to the A-900 forms: departments requested waivers, gave incomplete and inaccurate information, and resisted the whole idea of complying with A-900 forms. When Mr. Johnson came to UC, he attempted to bring change. Because of UC's resistance to Mr. Johnson's change, he warned Dr. Steger of the possible implications. Just a few months later, OFCCP began an audit of UC affirmative action program[s] that eventually led to UC's second OFCCP Conciliation Agreement. In that agreement, the OFCCP cited UC for nine violations of [ ] 29 C.F.R. § 60 *et seq.* Those were the exact violations of which Mr. Johnson warned.

Mr. Johnson Followed HR Department Rules

Written Evaluations

Dr. Steger also stated that one of the reasons he terminated Mr. Johnson was because he claimed Mr. Johnson did not follow HR's procedures regarding written evaluations. There is no policy that requires a written evaluation before the payroll certification.

HR Generalists' Salary

Dr. Steger claimed that Mr. Johnson paid four of the generalists annual salaries outside of the range for their positions. Ms. Tudor testified that UC's board of trustees and Dr. Steger both approved all the salaries for the generalists, and no person was paid outside the proper range.

Internal Complaints/Najiyyah Cunningham

Defendants also point out that Najiyyah Cunningham, a member of Mr. Johnson's own staff, filed an EEOC complaint against him. Ms. Echols testified that Ms. Cunningham had no basis to file a complaint against Mr. Johnson.

Mr. Johnson Did Nothing Improper in Contacting Board Members

Next, Dr. Steger complains that Mr. Johnson went around him to speak to two board members, George Strike and Ben Gettler. Dr. Steger, however, never told Mr. Johnson he should not talk to board members and he admitted that he did not consider it improper for an officer to talk to a board member on certain topics.

Mr. Johnson Properly Performed During the 925 Negotiations

Tuition Remission

Dr. Steger claims that Mr. Johnson accepted [a] labor agreement with the 925 union that was not sufficient to meet the board's minimum requirements on that matter. Dr. Steger's complaint is directly contradicted by Stephanie Echols, who testified that everything that she and Johnson did regarding tuition remission was consistent with what Dr. Steger had discussed with her.

Informing the Board of Settlement

Next, Dr. Steger complains that Mr. Johnson "dropped the ball in informing the Board" regarding the 925 negotiations. Dr. Steger told Mr. Johnson to prepare a bullet memo with the salient negotiating points. Mr. Johnson did exactly that. Dr. Steger also complained that Mr. Johnson did not provide the board a complete text of the 925 contract in a timely fashion. Ms. Echols, however, testified that there was nothing that Mr. Johnson did to slow up the process or could have done to speed up the process.

Mr. Johnson Was Responsive to Phone Calls and Letters

Dr. Steger's final complaint is that Mr. Johnson was not responsive to telephone calls and letters. Dr. Steger gave [ ] Mr. Johnson a memo, but he never asked Mr. Johnson to get back to him on that.

RETALIATION: TITLE VII/§ 1981/EQUAL PROTECTION

Title VII prohibits an employer from retaliating against an employee who has filed a discrimination charge or from retaliating against an employee who has opposed any unlawful employment practice. 42 U.S.C. § 2000e-3(a); *Harrison v. Metro Gov't of Nashville,* 80 F.3d 1107, 1118 (6th Cir. 1996).

Mr. Johnson's Prima Facie Title VII and § 1981 Retaliation Case

Mr. Johnson Engaged in Protected Activity

Mr. Johnson advocated the rights of minorities and he filed an EEOC complaint.

Defendants were Aware of Mr. Johnson's Protected Activity

Dr. Steger announced to the entire UC cabinet that Mr. Johnson had filed an EEOC complaint.

After Mr. Johnson's Protected Conduct, Defendants Took Adverse Action

Mr. Johnson filed his EEOC complaint on December 5, 1995, and Dr. Steger terminated him on January 17, 1996. That fact alone satisfies the third element of the Title VII *prima facie* retaliation case.

Causal Connection Between the Protected Activity and the Adverse Action

Direct Evidence

A causal link may be established [by] either of two methods: through direct evidence, or through knowledge by the employer coupled with a closeness in time that creates an inference of causation. *Wrenn v. Gould,* 808 F.2d 493, 500 (6th Cir. 1987). Here just as in *Price Waterhouse*, when Dr. Steger stated that he was terminating Mr. Johnson because of the complaints about the slowness of clearing the A-900 forms, Dr. Steger was giving direct evidence that he took the illegal criterion of

Dr. Harrison and others into consideration when he terminated Mr. Johnson.

Temporal Proximity / Circumstantial Evidence

The close proximity between the activity and the adverse action alone may be enough to establish the link. *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987). In this case, Mr. Johnson filed his EEOC complaint on December 5, 1995, and Dr. Steger terminated him on January 17, 1996. That short period of time—six weeks—is sufficient to create a causal link. Furthermore, Dr. Steger's increased monitoring of Mr. Johnson after he filed the EEOC complaint is sufficient to create a causal link.

Defendants' Proffered Explanation

In this case, the Defendants' proffered reason for terminating Mr. Johnson is the same for the discrimination as for the retaliation.

Dr. Steger's Mendacity / Mr. Johnson's Evidence of Pretext

Here, because Defendants' proffered reasons for terminat[ing] Mr. Johnson are the same for discrimination as for retaliation, his evidence to rebut the reasons are the same: (1) Dr. Steger's mendacity; and (2) Mr. Johnson's evidence that all of Defendant[s'] reasons are pretext.

SECTION 1983: FIRST AMENDMENT

For a plaintiff to prevail on a First Amendment retaliation claim, the plaintiff must prove that: (1) he

spoke out on a matter of public concern; (2) his speech was a substantial or motivating factor in Defendants' adverse action against him. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, [1977].

Matter of Public Concern

A matter of public concern is any speech "relating to any matter of political, social, or other concern to the community." *Connick v. Myers,* 461 U.S. [138,] 146, 103 S.Ct. [1684,] 1690 [(1983)]. ["I]llegal discrimination against public employees is a matter of public concern [and] any adverse employment decision resulting from [a] complaint about such discrimination necessarily violates the First Amendment." *Rice v. Ohio Dept. of Transp.*, 887 F.2d 716, 720 (6th Cir. 1989). Besides discrimination, any speech that is "calculated to disclose wrongdoing or inefficiency or other malfeasance on the part of government officials in the conduct of their official duties" is a matter of public concern. *Koch v. City of Hutchinson*, 847 F.2d 1436, 1445 (10th Cir. 1988).

In this case, Mr. Johnson came to UC seeking to enforce compliance with OFCCP affirmative-action requirements and the A-900 process. UC ignored Mr. Johnson's warning, and the OFCCP cited UC for nine violations of its affirmative-action duties. The issues raised in the OFCCP agreement are exactly the abuses of which Mr. Johnson warned from his first letter to the cabinet on July 21, 1994. His speech urging compliance with A-900 and OFCCP requirements was a matter of public concern.

Substantial or Motivating Factor

In a First Amendment case, the "matter of causation is an issue of fact which must be decided by the jury." *Matulin v. Village of Lodi*, 862 F.2d 609, 613 (6th Cir. 1988). In this case, Dr. Steger specifically terminated Mr. Johnson because of complaints about Mr. Johnson insisting on compliance [with] the A-900 process. That evidence alone is direct evidence that Mr. Johnson's speech about A-900 and OFCCP compliance was a substantial or motivating factor in his termination.

III. FACTS AND PROCEEDINGS

History of Illegal Conduct

The University of Cincinnati is a federal contractor, in that it has fifty or more employees and it has contracts with the federal government in excess of $50,000. 41 C.F.R. § 60-1.40. Because UC is a federal contractor, the United States government requires UC to meet certain affirmative-action obligations. Those obligations, among other things, consist of maintaining and updating affirmative action programs (41 C.F.R. § 60-1.40(a)(b)(c)); analyzing its workforce by race and sex (41 C.F.R. § 60-2.11(a)); analyzing areas of underutilization (41 C.F.R. § 60-2.11(b)); maintaining data (41 C.F.R. § 60-3.4); and analyzing adverse impact on minorities and gender (41 C.F.R. § 60-3.15[A](2)). If UC, or any other federal contractor, fails to meet those obligations, it violates federal law. 41 C.F.R. § 60-1.26. Violations of those obligations are monitored and enforced by the OFCCP. If the OFCCP determines that a federal contractor is violating its affirmative action duties, the OFCCP may impose sanctions ranging from [ ] issuing a show cause order or canceling the contract, to instituting

administrative investigations or referring violations to the Department of Justice for civil or even criminal prosecution. 42 U.S.C. § 2000e, Executive Order No. 11246 § 209 (2) (3) (4) (5).

Mr. Johnson's dispute has as its genesis UC's twenty-year history of violating its OFCCP affirmative-action obligations. In 1978, the OFCCP investigated UC and found among other things that "women and minorities tend to cluster disproportionately in the lower paid and lower level" positions. (Wyatt Affidavit, Exhibit A.) As a consequence, UC and OFCCP entered into the Conciliation Agreement of 1978. (Wyatt Affidavit, Exhibit A.) In that agreement, OFCCP ordered UC to implement procedures to prevent discrimination against women and minorities. (Wyatt Affidavit, Exhibit A.) The techniques that the OFCCP ordered UC to employ consisted of identifying underutilized positions, creating a list of candidates for new positions, and ensuring that the list included names of qualified women and minorities. (Wyatt Affidavit, Exhibit A.) If a nonminority male applicant was selected and if women and minorities did not appear on the candidate list, then the employing unit at UC was required to give written reasons for the omissions. (Wyatt Affidavit, Exhibit A.) The affirmative action office approved or disapproved of the selected person based on the affirmative action office's determination of whether race or gender was a factor in the selection. (Wyatt Affidavit, Exhibit A.)

Since the 1978 Conciliation Agreement, UC developed a form—the A-900 form—to track the hiring process mandated by the OFCCP. (Wharton Depo. at 20.) Even though the 1978 Conciliation Agreement expired in 1980, UC continued to use the A-900 form in an attempt to meet its ongoing affirmative-action OFCCP obligations.

(Wharton Depo. at 18, 20, 24, 53; Steger Depo. at 101.) The A-900 process required UC's managers in charge of hiring to identify an open position and inform the affirmative action office. (Johnson Depo. at 92.) The affirmative action office, in turn, would tell the hiring manager whether or not the vacant position was underutilized. (Johnson Depo. at 92.) The hiring manager would then solicit applications, select a candidate, and send the information to the affirmative action office. (Johnson Depo. at 94.) If the candidate was not a member of the underutilized class, then the affirmative action director and the hiring manager would determine whether sufficient numbers of members of the underutilized class[es] were considered. (Johnson Depo. at 96.) If sufficient numbers were not considered, the affirmative action director would recommend that the hiring manager attract additional applicants from the underutilized classes. (Johnson Depo. at 96.) In the end, the affirmative action director and the president of the university would have to approve any new candidate. (Johnson Depo. at 97.)

Following the expiration of the 1978 Conciliation Agreement, UC's affirmative action department fell into disarray. (Wharton Depo. at 17.) For years, there was no head of the affirmative action department. (Wharton Depo. at 17.) Barbara Walker, who had been Mr. Johnson's predecessor as vice president of human resources and human relations, was also the vice president in charge of affirmative action. Dr. Steger terminated her in 1991. From then until the time when Mr. Johnson was hired in August of 1993, there was no vice president in charge of affirmative action. (Wharton Depo. at 17.) Moreover, there were only two affirmative-action staff members. Because of the inadequate staff

and the sheer volume of A-900 forms, a backlog of A-900 forms developed. (Wharton Depo. at 17-20.)

Even prior to Mr. Johnson's arrival on campus, and during his tenure in office, there was a clear perception by responsible members of the university minority community that minorities were severely disadvantaged in terms of job and promotional opportunities. These problems were viewed as long-standing and institutional in nature. (Hughes Depo. at 19.) Of particular concern to some, was the under representation of minorities in administrative positions. (Castenell Depo. at 42, 59.) Other concerns centered around the campus life for minority students. (Wharton Depo. at 78; Castenell Depo. at 37.) More disheartening, was the fact that there remained a climate of hostility on campus that was drawn along racial lines. (Hughes Depo at 17.) To at least one member of the administration, if a person spoke out on issues of special concern to minorities, that person would suffer a detriment to his or her career aspirations. (Castenell Depo. at 66.)

John Johnson

During this time, Mr. Johnson was developing his career as [a] human resources executive. Mr. Johnson graduated with a B.A. in Psychology from the University of Maryland, and in 1986, earned a masters of organization[al] development and analysis from Case Western Reserve University. (Johnson Depo. at Exhibit 1.) After receiving his masters degree, he was appointed to [be] the manager of employment hiring and affirmative [sic] policies at Argo Tech Corporation. In that position, he was responsible for, among other things, compliance with OFCCP obligations. (Johnson Depo. at Exhibit 1.) Mr. Johnson then took a position as vice president of

human resources and administrative services at Merrill Publishing Company. He was serving as vice president of human resources at Doctors Hospital in Columbus, Ohio when he was hired in 1993 as VPHRHR at UC following a national search.

When Mr. Johnson arrived at UC, one of his top priorities was rebuilding the affirmative action office and enforcing the A-900 process. (Johnson Depo. at 42.) Those two efforts would help assure compliance with OFCCP obligations and EEO regulations. (Wharton Depo. at 53; Steger Depo. at 101.) One of the problems with the A-900 process was the excessive number of waivers that hiring managers were requesting. (Wyatt Affidavit at ¶ 5.) The managers requested those waivers when they did not wish to comply with the recruitment and selection process. (Wharton Depo. at 37, 40.) If the managers requested too many waivers and if the affirmative action office granted those waivers, the A-900 process would be undermined. (Wharton Depo. at 50; Wyatt Affidavit at ¶ 5.) Another problem with the A-900 process was that UC had focused on an after-the-fact analysis of the selection process. That meant that the affirmative-action office was not involved in the recruiting and selection process until the hiring manager made a recommendation. Affirmative action was, therefore, limited to approving or disapproving the selection, instead of being involved in the front-end recruitment, advertising, and selection process. (Wharton Depo. at 57.) Because affirmative action was responding to errors in the process, when it did become involved, it generally slowed down the entire procedure. (Wharton Depo. at 57.)

The Conflict Begins

Mr. Johnson first hired George Wharton, a new director of affirmative action. He also added additional staff for the affirmative action office. (Wharton Depo. at 16, 18.) At the same time, he attempted to cut down on the number of waivers, and to increase the amount of affirmative-action involvement in the initial recruitment and selection process. (Wharton Depo. at 50; Johnson Depo. at 42, 90-98.) He also cautioned UC about the ramifications of not dealing with the problems in affirmative action. Indeed, A-900 waivers presented a subtle tool for racism. (Castenell Depo. at 43.) In a letter to UC's cabinet on July 21, 1994, Mr. Johnson warned of the high number of waivers, the failure to comply with the A-900 process, and violations of the OFCCP requirements. (Steger Depo. at 208; Exhibit 23.) He further predicted that continued violations could cause the OFCCP to enforce [a] new conciliation agreement on UC. (Steger Depo. at 208; Exhibit 23.)

Mr. Johnson's July 21 letter upset the cabinet. (Steger Depo. at 209.) Dr. Steger told Johnson that managers were complaining about the delays in processing the A-900 forms, and that managers did not wish to comply with the A-900 process. (Steger Depo. at 101, 115; Johnson Depo. at 264.) Vincent Hughes heard stories about managers trying to get around the A-900 system. (Hughes Depo. at 86.) Dean Hutton complained that the affirmative action office was not processing requests for waivers quickly enough. (Steger Depo. at 204.) Dr. Steger and Johnson discussed the problem, and Dr. Steger agreed that at least part of the problem was that insufficient numbers of minorities and women were being considered for positions. (Steger Depo. at 115.) However, rather than support Mr. Johnson when Mr.

Johnson was trying to bring change to UC, Dr. Steger himself participated in undermining the affirmative-action process. One of the most striking examples was the hiring of Dr. Hurst at the UC Hospital. Dr. Harrison approved [the] hiring of Dr. Hurst before a waiver was even requested or approved. (Hutton Depo. at 43, Exhibit 5.) Dr. Steger nonetheless ratified Dr. Harrison's improper conduct and approved a waiver for Dr. Hurst at the medical college. (Harrison Depo. at 188, Exhibit 10.) Steger also personally requested and received a waiver for his own administrative assistant. (Steger Depo. at 321.)

These violations, among others, were taking place at the time a second OFCCP audit was beginning. On November 18, 1994, the OFCCP warned Dr. Steger of race and sex salary disparities as well as violations of reporting requirements. (Steger Depo. Exhibit 50, Bates 8473.) On May 26, 1995, the OFCCP completed the audit and sent a preliminary letter outlining nine UC violations. (Steger Depo., Exhibit 50, Bates 8473.) Shortly thereafter, Dr. Steger removed Mr. Johnson from any involvement in the OFCCP review by contracting out UC's OFCCP response to the law firm of Taft, Stettinius & Hollister. (Steger Depo. at 387.) Over the objections of Mr. Johnson, Taft engaged in a prolonged and controversial response to the OFCCP, attempting to minimize the impact of UC's violations. (Wharton Depo. at 81, Exhibit 5.)

Mr. Johnson's commitment to meeting the affirmative-action, OFCCP requirements and his commitment to the concerns of the minority organizations at UC led to a conflict between Mr. Johnson and UC. Mr. Johnson was being obstructed in his ability to do his job, he was being retaliated against because of his advocacy for women and minorities, and he was being prevented

from seeking compliance with OFCCP, EEOC, and UC affirmative-action requirements. (Johnson Depo. at 249, 328-29.)

Of particular concern to Mr. Johnson was the administration's refusal to allow him to participate in strategic planning as related to the Alliance. The Alliance is a private, non-profit corporation with a single board of directors vested with managerial control over Jewish, Christ, St. Luke's and University Hospitals. (Harrison Depo. at 12-17; Exhibit 3.) This formative period for the Alliance was critical in terms of the development and implementation of human resource policies that necessarily impacted personnel issues at University Hospital. (Steger Depo. [at] 323, Exhibit 37[;] Rhodes Depo. at 10.) Despite his expertise in human resource issues and his responsibility over personnel policies at University Hospital, Plaintiff was shut out of any meaningful role with respect to the Alliance. For example he was not appointed by the university administration to take part in planning groups for the Alliance, even though his HR counterparts in the other hospitals were regular participants. (Rhodes Depo. at 22; Harrison Depo. at 43-44; Von Zychlin [Depo.] at 11, 13.) He was also denied an invitation to a retreat at which critical HR issues surrounding the Alliance were scheduled to be addressed. (Von Zychlin Depo. at 31; Rhodes Depo. at 39; Echols Depo. at 110.) In November 1995, Plaintiff complained to Drs. Harrison and Steger about not being involved in matters pertaining to the Alliance. (Harrison Depo. at 44; Steger Depo. at 326, Exhibits 37, 39; Cohen Depo. at 11.) Mr. Johnson asked Defendant Steger to clarify his role at University Hospital. (Johnson Depo. at 246.) In response, Defendant Steger broadly, unfairly and inaccurately

attacked Plaintiff's performance and his personal and professional character. (Steger Depo., Exhibit 13.)

Dr. Steger Terminates Mr. Johnson

On December 5, 1995, Mr. Johnson filed an EEOC complaint regarding these matters. (Johnson Depo., Exhibit 5.) On December 20, Dr. Steger informed Mr. Johnson that he was preparing a communication regarding Mr. Johnson's performance as VPHRHR. Dr. Steger then set about compiling complaints from persons at UC to justify terminating Mr. Johnson. A couple of weeks later, Dr. Steger wrote another letter to Mr. Johnson, telling him he needed more time to "gather information" before he could respond. (Steger Depo., Exhibit 11.) On January 9, 1996, Steger sent Mr. Johnson a letter outlining his complaints, on January 16, Mr. Johnson responded, and on January 17, Dr. Steger terminated Mr. Johnson. (Steger Depo. at 56, Exhibit 5.)

As a result, Mr. Johnson filed this lawsuit. During the pendency of this litigation, everything that Mr. Johnson predicted about UC's compliance with OFCCP regulations and the affirmative action policies has come true. Less than a year after his termination, UC was forced to enter into its second OFCCP compliance agreement to correct the violations against which Mr. Johnson had battled during his time at UC. (Steger Depo. at 399, Exhibit 54.) As the following analysis will show, UC discriminated and retaliated against Mr. Johnson because he advocated the rights of minorities and women, because he attempted to ensure compliance with OFCCP affirmative-action obligations, and because he filed a charge of discrimination with the EEOC.

* * *

[This excerpt is page 1-20 of the original document filed in the district court.]

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No. 00-577

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNIVERSITY OF CINCINNATI, *et al.*,

Petitioners,

v.

JOHN B. JOHNSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Not one of the three issues ostensibly raised in the Petition is actually presented by this case. Indeed, the First Amendment issue raised by Petitioners, which they characterize as a "well-developed conflict among the courts of appeals," was never raised by the Petitioners below, nor was it passed upon by the District Court or the Sixth Circuit. Moreover, the Sixth Circuit's decision applies established principles to the factual record. A grant of certiorari, therefore, would not resolve any dispute among circuit courts of appeals, nor provide needed guidance to lower courts in applying well settled modes of analysis in Title VII, Section 1981 or First Amendment litigation.

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SUMMARY OF THE ARGUMENT

Certiorari is not warranted because the three issues raised by Petitioners are not, in actuality, presented by this case. In their effort to create issues where there are none, Petitioners misstate the nature of Respondent's claims and the factual record, and they mischaracterize the Sixth Circuit's decision.

A. First Amendment.

The Courts of Appeals are not sharply divided over the proper application of *Pickering* in public employee First Amendment speech cases. The law applicable in such cases is well established, and it was properly applied in this case. The absolute rule proposed by Petitioners, which is advanced for the first time in the Petition, has been consistently rejected by courts in deference to the *Pickering* balancing test.

Petitioners would have the Court insulate public bodies and their principals from accountability for speech designed to encourage or obtain compliance with their own rules and policies. Indeed, Petitioners' rule would authorize the punishment of those public officials who are duty bound to seek compliance with such guidelines. According to Petitioners, their categorical rule would permit the discharge of public employees for speech even in cases such as this where concerns about compliance were expressed *internally* by the very employee whose duties necessarily included ensuring such compliance, even in the absence of any evidence that such speech in any way hindered the employer's operation.[1]

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1. Indeed, the record in this case reflects that Petitioners have steadfastly denied that Mr. Johnson's speech played any role in his termination. To the contrary, Petitioners argued to the District Court and the Court of Appeals that Mr. Johnson's "inattentiveness" and "bungled efforts" at labor negotiations caused his termination.

B. Opposition to Discrimination.

Petitioners are similarly disingenuous when, as their second ground for Certiorari, they contend that the Sixth Circuit incorrectly applied Title VII and 42 U.S.C. § 1981 because, in Petitioners' words, "Johnson does not allege that any conduct he opposed was a violation [of said provisions]." (Petition p. 19). Petitioners' entire argument on this issue is premised upon a misrepresentation of the record (*i.e.*, that the only act for which Johnson was retaliated against was his generalized advocacy of affirmative action principles).

In truth, the record reflects that Respondent complained about what he perceived as unlawful discrimination on several specific occasions. For example, in one instance Respondent was told by the University's President, Petitioner Steger, that no consideration would be given to a black dean whom Respondent had suggested for a provost position because "we already have two black vice presidents, I can't bring in a black provost." Respondent's opposition to such blatant discrimination cannot be fairly characterized as, in Petitioners' words, "advocacy of affirmative action." Respondent opposed conduct made unlawful by Title VII and § 1981 (*i.e.*, the direct consideration of race as a factor in promotion decisions). Accordingly, the theoretical issue raised by Petitioners is not presented by this case.

Petitioners' argument is also troubling because they fail to appreciate that the conduct they characterize as "advocacy of affirmative action" includes legally protected opposition to perceived unlawful conduct. After several years at his job, Respondent Johnson became aware that minorities employed by the University of Cincinnati were overwhelmingly concentrated in the lower ranks. Respondent suspected that

the failure to hire minorities in middle and higher level positions might be due to the fact that the hiring process prescribed by the University's Affirmative Action Plan was routinely waived by the administration, and he feared that the pervasive use of such waivers was providing cover for unlawful hiring practices. As a consequence, Respondent opposed such practices by seeking to limit the use of waivers. Such conduct, while it could arguably constitute "advocacy of affirmative action," still constitutes opposition to what Mr. Johnson perceived as unlawful employment discrimination.

C. Participation in EEOC Process.

Finally, Petitioners blatantly misrepresent the allegations of Respondent's EEOC charge to support their argument that he may not maintain a Title VII claim for retaliation he experienced as a result of filing that charge. According to Petitioners, Respondent charged "that the University had violated Title VII by diminishing his influence because he advocated greater efforts at affirmative action." (Petition p. 25). Petitioners contend that, *as a matter of law*, Respondent Johnson could not have reasonably believed such an allegation would support a Title VII claim, and thus he was not protected from retaliation for filing such a charge. In truth, Respondent's EEOC charge alleged that he was retaliated against for "making an internal complaint about the selection process for the position of Chief Operating Officer for the hospital," which complaint is characterized in the charge as one of "unlawful racial bias." Significantly, Petitioners chose to omit from their Appendix a copy of Respondent's EEOC charge, which was an exhibit to the Complaint in this action. Respondent complained about what he reasonably perceived to be unlawful employment

discrimination and retaliation for opposing it. Under well established law, a retaliation claim may be premised upon such a charge.

STATEMENT OF THE CASE

At the outset, Petitioners state in sweeping language that Petitioner "claims that he was dismissed because he advocated more vigorous implementation of the University's affirmative action policies." (Petition "Questions Presented"). But "to generalize is to omit", and, unfortunately in this case, to misrepresent.[2] It is therefore necessary to provide a limited recitation of the facts and history of this case.

A. Facts.

Respondent, John B. Johnson, is an African-American. He was hired by the University of Cincinnati as its Vice President of Human Resources and Human Relations ("VPHRHR") on August 1, 1993, following a national search. As a primary goal of his position, the University charged Mr. Johnson with the responsibility for making UC a "place of respected diversity and free from racism" (Complaint ¶ 12, App. 94a). One of his many duties was to oversee the operation of the University's affirmative action office. One function of that office was to review all proposed new hires to ensure consideration of qualified minorities (the "A-900" form process). (App. 4a). Mr. Johnson also served on the President's Advisory Council on Race Relations and Human Decency, a group charged with examining issues of race relations at the University.

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2. *See* Justice Holmes writing in *Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U.S. 267, 273 (1908).

Mr. Johnson became concerned that discriminatory hiring practices were going undiscovered through the pervasive use of waivers to avoid the A-900 process. (App. 6a). In a letter to UC's cabinet dated July 21, 1994, entitled "Is there an Affirmative Action Commitment?", Mr. Johnson warned that continued overuse of waivers might lead to future investigations.[3] According to one long-time University administrator, A-900 waivers may be used as a tool for masking discriminatory hiring decisions. (App. 124a). Mr. Johnson also expressed concern to University President Steger about what he perceived as widespread pay disparities for lower level African American employees.[4]

Mr. Johnson raised additional concerns about unlawful discrimination in reference to several hiring decisions. For example, when a senior executive officer was sought for University Hospital, Mr. Johnson advocated for a minority candidate whom he considered more qualified than the white male ultimately selected. (App. 7a). Subsequently, when a new chair of the Department of Surgery was being selected, Mr. Johnson objected to the granting of a waiver of the A-900 process so that a white friend of Petitioner, Dr. Harrison, could be hired without consideration of other candidates.

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3. As explained at length in the Sixth Circuit's decision, UC's affirmative action plan was originally implemented pursuant to a Conciliation Agreement with the Office of Federal Contract Compliance Programs (OFCCP) following findings of repeated violations of Executive Order 11246. (App. 3a-5a). As feared by Mr. Johnson, an OFCCP audit of UC revealed numerous additional violations. (App. 6a n.1). On November 18, 1994, the OFCCP advised UC President Dr. Steger that it had found race and sex salary disparities as well as reporting violations. (App. 125a).

4. At Mr. Johnson's suggestion, a study of this problem was undertaken but terminated early by Dr. Steger.

Mr. Johnson wrote to Dr. Steger protesting the waiver and questioning the University's commitment to providing equal employment opportunities. (App. 8a). Similarly, when a new University provost was being sought, Mr. Johnson recommended consideration of Dean Castenell, an African American who had served UC for many years. In response, Dr. Steger remarked, "we already have two black vice presidents, I can't bring in a black provost . . . the faculty would kill me if I would bring in a black provost . . ." (App. 27a).

Ultimately, Mr. Johnson came to believe that he was being marginalized because of his protests over what he perceived to be discriminatory hiring practices. Accordingly, on December 5, 1995, Plaintiff filed an EEOC charge against the University. (App. 11a). Contrary to the claims in the Petition, Mr. Johnson's EEOC charge did not simply allege that he was being "obstructed in his efforts to promote affirmative action." (Petition p. 3). Rather, Mr. Johnson pointedly alleged that he was experiencing retaliation for "his complaints concerning the selection process for the hospital's chief operations officer position and his complaints concerning disparities in hiring and pay for minority employees . . ." (Amended Complaint ¶ 24, App. 98a). Six weeks after he filed his EEOC charge, Plaintiff's employment was terminated. (App. 12a; Amended Complaint ¶ 27, App. 99a).

B. District Court Proceedings.

Mr. Johnson filed this lawsuit in June 1996 claiming, among other things, that his termination was unlawful employment discrimination and retaliation for protected speech and activity in violation of Title VII, 42 U.S.C. § 1981, and the First Amendment. (App. 90a-104a).

Petitioners moved for summary judgment. With respect to Mr. Johnson's First Amendment retaliation claim, the Petitioners' sole argument in support of summary judgment was that "Johnson has submitted no evidence in opposition to the instant motion which would permit a reasonable jury to find that [his speech] was a 'substantial' or 'motivating' factor in the University's decision to relieve him of his duties."

In disposing of the claims pertinent to the instant Petition, the District court held that:

1. Mr. Johnson may not maintain a claim for unlawful discrimination in violation of Title VII because he is not a member of a protected class by virtue of his advocacy on behalf of minorities and/or women. (App. 76a).

2. Mr. Johnson could not have reasonably believed that he was engaging in protected activity when he filed his EEOC complaint. (App. 79a).

3. Mr. Johnson's speech was disruptive to the University's operation such that the government's interest outweighed his. (App. 85a-86a).

The District Court never addressed whether Mr. Johnson's position as Director of Human Resources and Human Relations impacted its analysis of his First Amendment claim. Thus, Petitioners did not advance the issue they seek to raise in their Petition, and, as a result, the District Court did not pass upon that issue.

C. Appeal to the Sixth Circuit.

Mr. Johnson appealed the District Court's ruling insofar as it dismissed his Title VII retaliation and discrimination

claims, his discrimination claim under 42 U.S.C. § 1981, and his claim under 42 U.S.C. § 1983 alleging unlawful retaliation under color of state law for engaging in speech protected by the First Amendment. In his appellate brief, Mr. Johnson argued at length that the District Court erred in its application of the doctrine established in *Pickering v. Board of Education*, 391 U.S. 563 (1968).

In response, Petitioners again argued only that there was no evidence from which Mr. Johnson could establish that his speech was a substantial or motivating factor in the University's decision to release him. Petitioners' brief to the Sixth Circuit cited neither to *Pickering* nor to any of the decisions they now advance in support of their contention that this case presents an opportunity to resolve a split among the Circuits over whether so called "policymakers" may maintain First Amendment free speech claims. The Sixth Circuit reversed the District Court's dismissal of Mr. Johnson's Title VII, Section 1981 and First Amendment claims.[5]

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5. Contrary to Petitioners' contention, the Court of Appeals did *not* hold that "Title VII and Section 1981 both provide a cause of action for an employee who alleges that his employer discharged him for advocating that the employer increase its affirmative action efforts." (Petition p. 5). Instead, following the long line of cases recognizing discrimination claims based upon the claimant's *affiliation* with someone whose race offends an employer, the Court of Appeals recognized that "the fact that Plaintiff has not alleged discrimination because of *his* race is of no moment inasmuch as it was a racial situation in which Plaintiff became involved — Plaintiff's advocacy on behalf of women and minorities in relation to Defendant's alleged discriminatory hiring practices — that resulted in Plaintiff's discharge . . ." (App. 21a).

The Court of Appeals noted that the Petitioners' rationale, which was adopted by the District Court, would enable employers "inclined to engage in invidious discrimination," to hire affirmative action officials to give the erroneous public impression that they oppose employment discrimination, secure in the knowledge that they could legally retaliate against such officials if they do the job they were ostensibly hired to perform. The Court of Appeals was quick to condemn such an approach as inconsistent with the purposes of Title VII and Section 1981, and as the kind of thinking that "turns back the hands of time on the issue of civil rights and equality in employment." (App. 26a-28a).

The Sixth Circuit also reversed the District Court's erroneous dismissal of Mr. Johnson's Title VII retaliation claims. Despite Petitioners' statement to the contrary, the Court of Appeals did not simply hold that Mr. Johnson's protests of "perceived deficiencies regarding affirmative action" could form the basis of his opposition claim. (Petition p. 6). Rather, the Court of Appeals found, as the record reflects, that "the actions taken by Plaintiff in response to hiring decisions which he felt were discriminatory and not in line with the A-900 process were sufficient to constitute opposition under Title VII." (App. 34a).

Similarly, with respect to Mr. Johnson's claim that he was retaliated against for *participating* in protected activity (*i.e.*, filing an EEOC charge), the Sixth Circuit held that the District Court erred by resolving contested issues of fact — Mr. Johnson's motive and good faith — as a matter of law. (App. 37a).[6]

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6. As to this issue, even the dissenting member of the Sixth Circuit panel, Judge Kennedy, agreed the District Court had erred. (App. 52a).

Finally, the Sixth Circuit reversed the District Court's dismissal of Mr. Johnson's First Amendment claim holding that Mr. Johnson's speech furthered the important interest of employment equality for women and minorities, and that any detrimental impact upon the University's operation was outweighed by the advancement of such an important interest. (App. 45a-46a).

Petitioners never contended before the Sixth Circuit that Mr. Johnson's "high ranking" position as a "policymaker" somehow barred him from pursuing a First Amendment retaliation claim. Thus, it is not surprising that there is no mention in the majority or dissenting opinion of the argument that Petitioners now seek to raise before the Supreme Court.[7]

D. Motion for Rehearing En Banc.

Drawing upon Judge Kennedy's dissent, Petitioners advanced three arguments in support of their request for rehearing. First, Petitioners argued that the Panel erred when it treated Mr. Johnson as a member of a protected class because of his affiliation with minorities who were not of a *different* race than him.[8] Second, Petitioners argued, as they

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7. The suggestion at page 7 of the Petition that Judge Kennedy, in her dissent, somehow addressed this issue is incorrect. Judge Kennedy's position on Mr. Johnson's First Amendment claim clearly turned upon her finding that Mr. Johnson's speech was *not* public, but rather restricted to internal channels at the University ("Had the plaintiff presented his concerns in a public venue, my resolution of this issue would be different."). (App. 53a).

8. Petitioners advanced the notion that a claimant who is discharged because of his affiliations (*i.e.*, interracial marriage), can only maintain a claim where there is a *contrast* in races. This specious argument has apparently been abandoned.

do in support of their Petition, that Mr. Johnson's opposition to what he perceived as discriminatory hiring practices is not protected activity because, according to Petitioners, Mr. Johnson was not actually opposing discrimination, he was "advocating affirmative action."

Finally, Petitioners sought rehearing as to Mr. Johnson's First Amendment claims because all of his speech was "internal" (*i.e.*, not public), and "within the scope of his duties." According to Petitioners, this fact removed Mr. Johnson's speech from the realm of "public concern."[9] None of the cases Petitioners now cite for the proposition that Mr. Johnson's First Amendment claim should not be subjected to a balancing of interests under *Pickering* were mentioned in their supporting brief. The Court declined to rehear the case.

Thus, the issue that Petitioners contend most clearly warrants the Court's attention (the so-called "policymaker" exception), has not been previously raised in this case. As a result, neither of the lower courts had an opportunity to pass upon it. Moreover, as will be shown below, the purported "split" among the circuits over this issue is nowhere near as sharp as Petitioners suggest. Under such circumstances, review is not warranted.

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9. Petitioners have apparently abandoned this argument as well, recognizing that under well established precedent purely "internal" speech can form the basis of a First Amendment claim. *See, e.g.*, *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 413-17 (1979). Indeed, Petitioners contend in footnote 13 that, under the rule they propose, it is irrelevant whether the speech at issue is internal or external.

REASONS FOR DENYING THE WRIT

This case does not present a single issue worthy of the Court's attention. Petitioners' primary argument, that there is a split among the circuits, was neither raised nor considered below. It would make little sense to address such a purported circuit split in a case where the Court of Appeals did not recognize or consider the competing arguments because it was never asked to do so. Petitioners' claim that the Sixth Circuit recognized a Title VII and Section 1981 claim for "advocacy of affirmative action" is simply false, and, as such, does not merit review. Petitioner's final claim, that Mr. Johnson could not have believed his EEOC charge was warranted, is merely an attack on the Sixth Circuit's proper application of summary judgment methodology.

A. Review of issues neither raised nor passed upon below is strongly disfavored.

It is well established that, "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970). Only in "exceptional cases" is consideration of issues never raised or passed upon below appropriate. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Even then, the scope of review may be curtailed in order to afford the lower courts an opportunity to consider such issues. *Id.* (remanding to district court to consider conflict between state and federal statute not previously raised). Finally, review of such questions may be difficult or impossible if the factual record, developed without thought to such unraised issues, is insufficient.[10]

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10. *See United States v. Mendenhall*, 446 U.S. 544, 552 n.5 (1980) (undertaking review of unraised question based on finding of adequate evidentiary record).

This is not an "exceptional" case. The Court has provided guidance on the issue raised by Petitioners on several occasions, and the contention that there is a split among the circuits is predicated entirely upon an inflated interpretation of cases dealing with political patronage.[11] Even assuming that the issue raised for the first time on appeal by Petitioners is worthy of resolution by the Court, this case is not an appropriate opportunity for such review. Petitioners contend that, with respect to First Amendment speech claims by high level "policymakers," there "should be no particularized balancing of competing interests." (Petition p. 11). The applicability of Petitioners' proposed rule then turns upon whether Mr. Johnson was a "policymaker" or "high level officer" within the meaning of the proposed rule. While one might assume from Mr. Johnson's title that he would fit within such a category were it to be created, the factual record was never developed with this issue in mind, nor did the District Court or the Court of Appeals grapple with the record with respect to this issue.

The political patronage cases upon which Petitioners rely clearly provide that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1980). Translating this principle to the rule espoused by Petitioners,

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11. To the extent Petitioners claim that the Sixth Circuit has chosen a side in the alleged division between the circuits in its decision in this case, they are mistaken. It defies imagination how a court of appeals that was not asked to address an issue, and therefore did not address an issue, can be said to have resolved that issue.

it would appear incumbent upon Petitioners to *demonstrate* that a limitation upon Mr. Johnson's speech was "an appropriate requirement for the effective performance" of his position. Because Petitioners never advanced their new argument below, they never made such a showing. Instead, they ask the Court, contrary to the decisions upon which they rely, to assume such facts. As a result, any review of this case with respect to the First Amendment issue now raised by Petitioners for the first time, would be purely advisory, necessitating a remand for further development and consideration of the factual record.

B. There is no need for the Court to revisit its decision in *Pickering* or its progeny.

1. *The Court's precedents have provided ample guidance on this issue.*

Petitioners contend that the Court's decisions involving First Amendment speech claims have left unresolved the issue of whether the judiciary may employ a "categorical" rule akin to that established in *Branti* with respect to claims brought by high level employees. (Petition p. 10). To the contrary, the Court has clearly indicated that such bright lines cannot be drawn in speech cases. In *Connick v. Myers*, 461 U.S. 138 (1983), the Court reiterated the following language of the *Pickering* court:

> Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to lay down a

> general standard against which all such statements may be judged.

Connick, 461 U.S. at 154 (ellipses in original).[12]

Four years later the Court ruled that the nature of an employee's responsibilities is a factor to consider when balancing interests under *Pickering*.

> [I]n weighing the State's interest in discharging an employee based on any claim that the content of a statement made by the employee somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails.

Rankin v. McPherson, 483 U.S. 378, 390 (1987)).[13]

12. *See also United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995), noting that government's burden under *Pickering* to support "wholesale" deterrent to broad category of speech is even greater because *Pickering* and its progeny were designed to address actual individual speech.

13. Significantly, the *Rankin* Court rejected a categorical rule advanced by the public employer during oral argument which would have insulated the employer from liability for firing deputized employees due to their speech. *Id.* at 391 n.7. The *Rankin* Court also noted that there is no categorical rule that low level employees may not be terminated for the content of their speech. *Id.* at 391 n.18. *See also O'Hare Truck Svce., Inc. v. City of Northlake*, 518 U.S. 712, 719 (1996), distinguishing political affiliation and patronage cases involving "raw test of political affiliation" (*i.e.*, *Branti* and *Elrod v. Burns*, 427 U.S. 347 (1976)), from speech cases in which "the balancing *Pickering* mandates will be inevitable."

Petitioners urge the Court to adopt a rule granting public employers free reign to terminate high level employees for their speech on matters of policy, regardless of whether such criticisms are made internally or externally or whether such speech is, as in this case, integral to the performance of the employee's duties. There is no reason to consider such a baseless argument. As the Court noted in *Waters v. Churchill*, 511 U.S. 661, 664 (1994), "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." Petitioners would have the Court abandon such principles entirely and gag policymakers from debating policy, internally and externally. Under such Orwellian restrictions on speech by public employees, government practices may proceed "efficiently," but without the benefit of any debate whatsoever by, or even among, those employed to make and enforce policies. First Amendment rights are closely guarded to prevent just such results.[14]

2. *There is no clear "split" among the circuits.*

Petitioners contend that the D.C., First, Seventh and Ninth Circuits have all held that "there should be no particularized balancing of competing interests" with respect to speech by public employees holding "policy-level" positions, and that the Second, Fifth and Tenth Circuits have disagreed. (Petition pp. 11-12). A review of the cases cited by Petitioners, and the progeny thereof, reveals that this is a misstatement of the law.

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14. *See Pickering*, 391 U.S. at 573 ("The public interest in having free and unhindered debate on matters of public importance — the core value of the Free Speech Clause of the First Amendment.").

In the case most forcefully argued by Petitioners, *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988), the Court of Appeals did undertake to refine the *Pickering* test as it relates to policy-making public employees. However, in no way did the Court suggest that it was disposing of the ultimate need to balance the employee's speech interest against the government's interests as mandated by *Pickering*. Rather, the Court prescribed several steps by which those interests can be balanced:

> We will ask first whether the employee's position relates to an area as to which there is room for principled disagreement on goals or their implementation. In other words, is it a policy area? If so, we then ask whether the office gives the employee broad responsibilities with respect to policy formulation, implementation, or enunciation. Put differently, was the individual a policy level employee? **If both criteria are met, we ask whether the government interest in accomplishing its organizational objective through compatible policy level deputies is implicated by the employee's speech.**

Id. at 264 (emphasis added). The D.C. Circuit's decision in *Hall* cannot be fairly characterized as the departure from *Pickering* suggested by Petitioners. The final analysis prescribed by *Hall* is still a balancing act. Indeed, in affirming the district court in *Hall*, the D.C. Circuit found that it "rightly concluded that . . . the government's interest in the effective functioning of its enterprise outweighed Hall's interest in speaking on a matter of public concern." *Id.* at 264.

The same is true of the other decisions cited by Petitioners. In *Flynn v. City of Boston*, 140 F.3d 42 (1st Cir.), *cert. denied*, 525 U.S. 961 (1998) the Court first held that the plaintiffs, an agency director and an operations director, could be terminated because of their political affiliations under the *Branti* and *Elrod* line of decisions following a change in the City's administration. *Id.* at 45. Noting the need to balance employees' speech interests against government employers' interests, the court went on to hold that the plaintiffs' speech "did bear on the job and their working relationship" such that plaintiffs' interests were outweighed. Finally, the court was careful to point out that its decision "does not mean that anything goes for policy-related positions", implicitly preserving the balancing test mandated by *Pickering*. *Id.* at 47.[15]

Similarly, the Ninth Circuit has not, as Petitioners claim, adopted a categorical rule for policymakers. In *Weisbuch v. County of Los Angeles*, 119 F.3d 778 (9th Cir. 1997), the case cited by Petitioners, the Court responded at length to criticism from a dissenting judge about performing the *Pickering* balancing test on the basis of the pleadings without further factual development. *Id.* at 783 n.1. Nowhere did the *Weisbuch* majority proclaim that it had adopted a rule abrogating the necessity of *Pickering* balancing; rather, the

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15. A subsequent First Circuit decision not alluded to by Petitioners confirms this reading of *Flynn*. "We held that Flynn's interest in free speech, and the public's, were outweighed by the government's interest in promoting efficiency of its services, specifically the effect of the statements on those close working relationships for which personal loyalty and confidence are necessary." *Padilla-Garcia v. Rodriguez*, 212 F.3d 69, 79 (1st Cir. 2000). Clearly, the First Circuit has not abandoned the balancing test required by *Pickering* as suggested by Petitioners.

court reaffirmed that it believed the pleadings enabled it to perform the required analysis. *Id.*[16]

Of the Circuits identified by Petitioners, only the Seventh Circuit has actually announced a "policymaker" exception to the *Pickering* analysis. However, in a recent decision not discussed by Petitioners, the Seventh Circuit made it clear that its exception is limited to those situations where termination could be justified under the *Branti* and *Elrod* line of cases. "The policymaking employee exception does not immunize public employer action unconnected to and unmotivated by need for political loyalty." *Bonds v. Milwaukee County*, 207 F.3d 969, 979 (7th Cir. 2000). In *Bonds*, Milwaukee County withdrew a job offer to the Plaintiff after he was publicly critical of a policy of the City of Milwaukee, by which he was then employed. The Seventh Circuit reasoned that "[t]he policymaking employee exception does not apply to the recision of Bond's job offer because the County did not withdraw its offer for 'political reasons,' and *Pickering* balancing thus applies." *Id.* at 979.[17]

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16. In a subsequent decision involving a high ranking official in Washington State's Office of the Commissioner of Insurance, the Ninth Circuit again made no effort to announce a categorical rule such as that advocated by Petitioners; rather the court considered the plaintiff's high level position as a pertinent factor to be weighed in applying *Pickering*. *Moran v. State of Washington*, 147 F.3d 839, 849 (9th Cir. 1998) ("The fact that Moran occupied the post of Deputy Commissioner, a policymaking position, also weighs in favor of [the] Commissioner.").

17. District Court's within the Seventh and First Circuits have recently minimized or rejected the preclusiveness of the so called "policymaker" exclusion. For example, in *Malone v. Indianapolis Housing Agency*, 102 F. Supp. 2d 1038, 1043 (S.D. Ind. 2000), the (Cont'd)

Petitioners' hyperbolic reading of the cases cited in support of the rule they propose is perhaps best illustrated by their citation to *Nelson v. Pima Community College*, 83 F.3d 1075 (9th Cir. 1996), which they characterize as "noticeably similar" to the instant case. (Petition p. 14 n.9). The Plaintiff in *Nelson* (an affirmative action director) was fired after admittedly issuing orders to staff members in direct contradiction to directives from her superiors. Applying the *Pickering* test, the court reasoned that "an employee's interest in giving unauthorized and insubordinate orders could rarely if ever outweigh her employer's interest in promoting the efficiency of public services . . ." *Id.* at 1081. The instant case is nothing like *Nelson*. There is no allegation in the record that Mr. Johnson engaged in any of the outrageous behavior attributed to the Plaintiff in *Nelson*, and Petitioners do not even contend that Mr. Johnson was ever insubordinate. More important, the *Nelson* court made no mention of the rule proposed by Petitioners or any split among the circuits. Rather, it employed the same balancing test as the Sixth Circuit did in this case. Contrary to the arguments in their brief, Petitioners do not prefer the law applied in *Nelson*, they prefer the facts.[18]

(Cont'd)
court noted in response to defense arguments comparable to those advanced by Petitioners that "just because an employee is a policymaker, she does not lose entirely her right to free speech. . . . the plaintiff's politics must be implicated in the discharge." (citations omitted). *Parks v. City of Brewer*, 56 F. Supp. 2d 89, 99 (D. Me. 1999) ("Defendants are not relieved of their burden to demonstrate that [plaintiff's] statements disrupted governmental function simply because Plaintiff was a high level policymaker.").

18. *See also Nunez v. Davis*, 169 F.3d 1222 (9th Cir. 1999) (employing *Pickering* balancing test with respect to supervisory employee's speech contradicting superior on matter of policy).

Review of the cases cited by Petitioners from the Second, Fifth and Tenth Circuits reveals little actual disagreement with the decisions discussed above. In *Lewis v. Cohen*, 165 F.3d 154 (2d Cir.), *cert. denied*, 120 S. Ct. 70 (1999) the Court of Appeals reversed a $2,000,000 award for the terminated chief of a unit of the Connecticut lottery based upon the court's application of the *Pickering* test. In reaching its conclusion that the state's interest outweighed the employee's interest in his speech, the court gave significant, but not determinative, weight to the fact that the plaintiff/ employee was a high level official:

> [T]he *Pickering* balance is affected by the nature of the disciplined employee's responsibilities. The more the employee's job requires confidentiality, policymaking, or public contact, the greater the state's interest . . . The policymaking status of the discharged employee is very significant in the *Pickering* balance, but not conclusive.

Id. at 162 (citations omitted). Similarly, in *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988 (5th Cir. 1992), the Fifth Circuit affirmed summary judgment dismissing the plaintiff's First Amendment claim reasoning that "in light of his high-level policy-maker and confidential position, Kinsey stepped over the line." *Id.* at 996. The same is true of *Barker v. City of Del City*, 215 F.3d 1134, 1138 (10th Cir. 2000), in which the court cited with approval the Seventh Circuit's decision in *Bonds v. Milwaukee County* for the proposition that "an employee's status as a policymaker bears considerable attention when weighing the interests of the government."[19]

19. *See also Curtis v. Oklahoma City Public Schools*, 147 F.3d 1200, 1213 (10th Cir. 1998) ("The employee's burden of caution is greater when the employee serves in a confidential, policymaking, (Cont'd)

Thus, regardless of the circuit in which a case is brought, the courts uniformly accord substantial weight to the level of an employee's position when considering the balancing test established in *Pickering*. This does not constitute a "sharp" split among the circuits as suggested by Petitioners. Had Petitioners ever contended in the lower courts that Mr. Johnson's high level position should have had some bearing upon consideration of his First Amendment claim, the courts would have been obliged to conduct such an analysis under the precedent discussed above.[20] However, Petitioners chose to never raise such issues in the lower courts, preferring instead to contend that Mr. Johnson's speech was not a

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or public contact role . . ."). Although not mentioned by Petitioners, the Fourth Circuit has also given significant, but not determinative, weight to a public employee's high level status. *See McVey v. Stacy*, 157 F.3d 271, 278 (4th Cir. 1998).

20. We note with some disbelief Petitioners' contention that the Sixth Circuit "rejected the University's argument . . . that it was inherently disruptive to have the University's senior personnel officer disagreeing with the President over how best to implement the University's affirmative action plan." (Petition p. 16). Our review of Petitioners' filings with the lower courts did not reveal such an argument being advanced by Petitioners. Moreover, as a practical matter it seems silly to suggest that Mr. Johnson could be fired for the act of *disagreeing* over the implementation of the affirmative action plan he was charged with administering. Had he actually *failed* or *refused* to implement it in the manner ultimately directed by his superiors, then his speech might arguably be considered disruptive. However, providing input on the most effective and proper way to implement such a plan was part and parcel of the reason for employing Mr. Johnson and his expertise. The public would hardly be served by employing a cadre of highly trained experts who are subject to termination if they suggest *internally* that a policy might better be pursued in a different manner.

substantial or motivating factor in the decision to terminate his employment. Indeed, Petitioners offered a completely different explanation for Mr. Johnson's termination (*i.e.*, allegedly bungled labor negotiations). Petitioners should not now be permitted to introduce a new argument that they failed to raise by concocting an imagined split among the circuits.

C. The Sixth Circuit properly recognized Mr. Johnson's Title VII and Section 1981 claims.

1. *Mr. Johnson's "opposition" claim under Section 704 of Title VII is not predicated upon UC's failure to satisfactorily implement its affirmative action plan.*

Petitioners argue that "opposing an employer's deficiencies in affirmative action is not opposing an unlawful practice under Title VII." (Petition p. 18). In some instances this statement might be true; however, Petitioners again broadly and erroneously attempt to paint everything Mr. Johnson did as advocacy of "affirmative action," when in fact Mr. Johnson actively opposed what he perceived as discriminatory hiring practices and several discrete instances of discrimination.[21] In attempting to gloss over these facts by labeling them as mere "deficiencies in affirmative action,"

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21. For example, Mr. Johnson voted against the hiring of a white male for Senior Executive Officer of University Hospital, preferring an African American male candidate whom he perceived as more qualified. Similarly, Mr. Johnson objected to Dr. Harrison's efforts to circumvent the candidate review process to hire a white friend as Chair of the Department of Surgery to the exclusion of qualified minorities. Mr. Johnson also opposed the President's refusal to even consider a highly qualified African American dean for the position of Provost simply because Dr. Steger thought there were already enough black vice presidents.

Petitioners fundamentally miss the point that one way to combat discrimination is to implement the safeguards associated with an affirmative action plan, such as hiring processes that ensure decisions are not made in a way that permits the purposeful exclusion of minority candidates.[22] In many instances, Mr. Johnson's attempts to obtain compliance with the University's affirmative action plan were in fact acts of opposition to what he reasonably considered discriminatory hiring practices. Such opposition is clearly protected by Title VII. *See Parker v. Baltimore & Ohio Railroad*, 652 F.2d 1012 (D.C. Cir. 1981) (opposition to a legally permissible affirmative action plan constitutes protected activity based on good faith belief that challenged practice violates Title VII).[23]

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22. *See, e.g., Miller-Calabrese v. Continental Grain Co.*, 1997 WL 392340 (N.D. Ill. 1997), noting that

> conduct which violates Executive Order 11,246 may also violate Title VII. For example, an employer who acts to discourage the employment of members of protected groups may violate both Executive Order 11,246 and Title VII. Thus, it does not follow necessarily that an employee's duties which focus on an employer's compliance with an Executive Order concerning affirmative action is not protected by the provision. A plaintiff may allege conduct that is violative of both regulations.

23. The case cited by Petitioners, *Evans v. Kansas City School Dist.*, 65 F.3d 98 (8th Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996) is inapplicable in this case. The Eighth Circuit found no evidence that the plaintiff had opposed what she perceived as a "discriminatory *employment* practice," because plaintiff opposed the district's desegregation plan. In this case, Mr. Johnson opposed what he considered to be unlawful *employment* practices (*i.e.*, discriminatory

(Cont'd)

2. *The Sixth Circuit properly recognized Mr. Johnson's claims under Section 703 of Title VII and 42 U.S.C. § 1981 for unlawful discrimination based upon his affiliation with women and minorities.*

Petitioners again mischaracterize Mr. Johnson's arguments and the ruling of the Sixth Circuit by contending that "Johnson argued, and the Sixth Circuit agreed, that *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), supports holding employers liable under Section 1981 if they adversely treat an employee for advocating affirmative action." (Petition p. 18). The Sixth Circuit's ruling in this regard had nothing to do with "advocacy of affirmative action." In accordance with abundant authority, that court recognized that under both Title VII and Section 1981, claims may be maintained where the alleged discrimination was based upon racial animus "towards third persons with whom the individuals associate." (App. 19a).[24]

Mr. Johnson necessarily affiliated with minorities and women, and indeed he advocated on their behalf in the face of UC's discriminatory hiring practices. For example,

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(Cont'd)
hiring and wage practices). Regardless of whether such acts actually proved unlawful, Mr. Johnson's activity is entitled to legal protection. *See Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041 (7th Cir. 1980) (erroneous advice to an employee that the company's pregnancy disability policy was illegal was protected); *See also EEOC v. St. Anne's Hospital of Chicago, Inc.*, 664 F.2d 128, 132 (7th Cir. 1981) ("Title VII does not apply solely to those actions which are in opposition to past unlawful practices of the employer.").

24. *See Tetro v. Popham*, 173 F.3d 988, 994 (6th Cir. 1999) (recognizing Title VII claim based upon animus towards plaintiff's biracial child), and other cases cited by Sixth Circuit (App. 19a).

Mr. Johnson proposed an African American candidate, a dean of long standing, for the position of provost, and was verbally assaulted in response because Dr. Steger apparently considered the idea of a black provost out of the question. Clearly, such affiliations may form the basis for actionable claims under Title VII and Section 1981.

3. *The Sixth Circuit's decision will not have the dire consequences predicted by Petitioners.*

Petitioners predict that the Sixth Circuit's interpretation of Title VII and Section 1981 in this case will give rise to unprecedented "free speech" rights in the private sector by, granting employees "absolute immunity from discipline in response to speech concerning race or gender issues." (Petition p. 21). There is no reason for concern. Under the "opposition" clauses of the various federal employment statutes (*i.e.*, Title VII, the ADA, the ADEA, the FMLA, the FLSA, etc.), employees, even private sector employees, already enjoy a measure of freedom to voice their opposition to perceived unlawful treatment.[25] Such freedom is far from unlimited. Employers may discipline or even terminate employees whose opposition activity becomes truly disruptive.[26]

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25. *See discussion in Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1569 (2d Cir. 1989), noting that "Congress sought to protect a wide range of activity . . ."

26. *See Hochstadt v. Worcester Foundation*, 545 F.2d 222, 231 (1st Cir. 1976), upholding termination for disruptive "opposition" holding that "the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel." Note, however, (Cont'd)

The Sixth Circuit's decision does not alter the current state of the law. The law would only be dramatically altered if Petitioners' arguments were adopted. According to Petitioners individuals employed as affirmative action directors would be unable to maintain claims for opposing unlawful discrimination because all such opposition would be considered "advocacy of affirmative action." In effect, such individuals would forfeit the right to oppose unlawful employment practices in their workplace. Such a result is at odds with the notion that Title VII protections cannot be prospectively waived.[27]

D. The Sixth Circuit properly recognized Mr. Johnson's "participation" claim because the allegations of his EEOC charge, if proven, constituted Title VII violations.

In support of their final argument, Petitioners contend that "Johnson should have known that he was not opposing Title VII violations when he was protesting what he saw as non-compliance regarding affirmative action." (Petition p. 25). However, as indicated in the Complaint, Mr. Johnson's EEOC charge alleged that he was being retaliated against as a result of his complaints about hiring and pay

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(Cont'd)
that such decisions "must be read narrowly lest legitimate activism by employees asserting civil rights be chilled." *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346, 1355 (9th Cir. 1984) (distinguishing *Smith v. Singer Co.*, 650 F.2d 214 (9th Cir. 1981) and *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978), cited by Petitioners).

27. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) ("[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII.").

disparities for minority employees. (App. 98a). Obviously, disparate treatment of minorities in hiring or pay would violate Title VII. Thus, Petitioners' diatribe and citation of authority to the effect that Mr. Johnson, as a human resources professional, could not possibly have believed he was complaining about a Title VII violation, is simply misplaced, as is their contention that the Court should consider this issue.

The only actual question presented is whether Mr. Johnson in fact believed such disparities existed. If he did not, then his participation claim must fail.[28] As the Sixth Circuit properly held, Mr. Johnson's belief when he filed his EEOC charge cannot be resolved at the summary judgment stage. Thus, a jury question is presented.[29] Indeed, even Judge Kennedy, who dissented from the Sixth Circuit's panel decision on all other issues, agreed that Mr. Johnson is entitled to a trial on this issue.

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28. *See Wilson v. UT Health Center*, 973 F.2d 1263 (5th Cir. 1992) (affirming district court's dismissal of Title VII claim following bench trial finding that plaintiff made misrepresentations).

29. *See Dey v. Colt Construction & Dev. Co.*, 28 F.3d 1446, 1457-58 (7th Cir. 1994) (reversing grant of summary judgment because material issues of fact remained as to whether employee held sincere belief that supervisor's conduct constituted sexual harassment). *See also Hargens v. U.S. Dep't of Agriculture*, 865 F. Supp. 1314, 1329 (N.D. Iowa 1994); *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994); *Benkritis v. Johnson*, 882 F. Supp. 521, 526 (D.S.C. 1995); *Trent v. Valley Elec. Ass'n*, 41 F.3d 524, 527 (9th Cir. 1994).

CONCLUSION

Petitioners have failed to raise any genuine issues of exceptional importance. Accordingly, certiorari should be denied.

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In the Supreme Court of the United States

UNIVERSITY OF CINCINNATI, *et al.*, Petitioners,

v.

JOHN B. JOHNSON, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The First Amendment and Title VII issues in the petition merit review and are properly presented.

I. The First Amendment question presents a clear and acknowledged circuit split.

The petition's first question is whether *Pickering v. Board of Education*, 391 U.S. 563 (1968), calls for case-by-case balancing when a high-level officer of a public agency is dismissed for disagreeing with the agency about its policies. In petitioners' view, the categorical approach taken in *Branti v. Finkel*, 445 U.S. 507 (1980), rather than case-by-case balancing, should apply in this context.

Respondent asserts that the courts of appeals are not divided over this question. But the courts themselves expressly acknowledge such a split. As the Seventh Circuit has put it, "[t]he circuits disagree about the relationship between the *Pickering/Connick* cases and the *Elrod/Branti* cases." *Marshall v. Porter County Plan Commission*, 32 F.3d 1215, 1220 (7th Cir. 1994).

Other opinions are equally clear. *See, e.g., McEvoy v. Spencer*, 124 F.3d 92, 102 (2d Cir. 1997) ("Although some courts have suggested that a dispositive policymaker exception also exists in the *Pickering* context . . . we reject such a position.") (citations omitted); *Lewis v. Cowen*, 165 F.3d 154, 162-163 (2d Cir. 1999) ("Where the discharge is based on discrete incidents of speech rather than political affiliation, *Pickering*, not *Branti* and *Elrod*, provides the appropriate framework of analysis. To the extent that the Ninth Circuit[ ] . . . supports a contrary view, we have rejected that view."); *Wilbur v. Mahan*, 3 F.3d 214, 219 (7th Cir. 1993) (rejecting the Eleventh's Circuit's view that "the *Elrod* and *Pickering* lines of cases cannot be combined"). *See also Warzon v. Drew*, 60 F.3d 1234, 1238 (7th Cir. 1995) (confirming the

Seventh Circuit's "categorical" rule that "[o]nce the employee is classified as confidential or policymaking, he can be fired on political grounds even if there is no evidence that he would not serve his political superiors loyally and competently") (internal quotation omitted);[1] *Flynn v. City of Boston*, 140 F.3d 42, 47 (1st Cir. 1998) ("where the employee is subject to discharge for political reasons under the *Elrod* and *Branti* cases, a superior may also—without offending the First Amendment's free speech guarantee—consider the official's substantive views on agency matters in deciding whether to retain the official in a policy related position").[2]

Johnson's failure to perceive this clear conflict rests upon a misconception of the *Branti*-like categorical rule and its relationship to the *Pickering* balancing test. Johnson says (Opp. 17-18) that there is no conflict because all the courts that adopt the *Branti*-like rule are actually engaging in balancing. But "wholesale" balancing that results in adoption of a categorical rule for all cases involving high-level policy disputes is very different from "ad hoc" balancing that evaluates the strength of the government's interests in each case involving a high-level policy dispute.

Moreover, this distinction between "ad hoc" and "wholesale" balancing (which is also called "definitional balancing") is well recognized in First Amendment

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[1] Contrary to Johnson's suggestion (Opp. 19), the Seventh Circuit has not renounced its holding in *Warzon*. The hiring case on which Johnson relies, *Bonds v. Milwaukee County*, 207 F.3d 969, 978 (7th Cir. 2000), cites *Hall*, *Flynn*, and *Warzon*, to make clear that its decision does not undercut its *Branti*-derived categorical rule for dismissal cases. *Id.*

[2] Commentators likewise have long recognized the circuit conflict on this First Amendment question. *See* Craig Singer, *Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Affiliation*, 59 U. Chi. L. Rev. 897, 898 (1992); James Kimmell, Jr., *Politics and the Non-Civil Service Public Employee: A Categorical Approach to First Amendment Protection*, 85 Colum. L. Rev. 558, 563-65 (1985).

jurisprudence, as is the need to balance competing considerations before adopting a categorical rule for a certain class of speech-related cases. *See generally* Gerald Gunther & Kathleen Sullivan, First Amendment Law 12-13 (1999) ("definitional balancing generates *per se* rules or categories for future cases"). This point is as true for a categorical rule in "obscenity" or "incitement to violence" cases as it is for high-level policy disputes. *See Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Brandenburg v. Ohio* 395 U.S. 444 (1969) (per curiam) (incitement to violence). For this reason, it is to be expected that the courts of appeals which have adopted the *Branti*-like categorical rule have explained the wholesale balancing of competing considerations that led them to adopt a *per se* rule. *See Flynn*, 140 F.3d at 48.[3]

For this reason also, the *Branti*-like categorical rule is not inconsistent with *Pickering* itself, and the petition does not contend otherwise. On the contrary, as the petition observes (at 9), *Pickering* expressly left open whether a *per se* rule would apply to the category of high-level policy disputes. Thus, the *Branti*-like categorical rule can be understood as an application of *Pickering* balancing to a certain category of cases.

This point, however, does not diminish the real conflict that exists between "wholesale" and "ad hoc" balancing. On the contrary, the First Amendment issue in this case represents a distinct fork in the road regarding the *Pickering* doctrine. Is it the task of a court, even in cases involving high-level policy disputes, to conduct a particularized inquiry into the strength of the agency's interests in making sure that a senior deputy shares the agency's policy positions? Or, instead, is there "no further weighing" of interests because "the balances have already been struck by the categorization of a worker as a policymaker"? *Kinsey v. Salado Independent*

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[3] The First Circuit's recent confirmation of *Flynn* in *Padilla-Garcia v. Rodriguez*, 212 F.3d 69, 79 (1st Cir. 2000), is fully consistent with this point.

School District, 950 F.2d 988, 998 (5th Cir. 1992) (en banc) (Higgenbotham, J., concurring specially).

As their opinions clearly reveal, the courts of appeals are sharply divided on which path to take at this fork in the *Pickering* road. The Sixth Circuit's decision here, by requiring a particularized showing of disruption in a case involving a high-level policy dispute (App. 45a-46a), plainly shows the problem of going down one fork in this road rather than the other. Accordingly, this Court should grant certiorari here to settle which of these two different directions is correct.

II. The First Amendment question is properly before this Court.

Johnson argues (Opp. 12) that the *Branti*-like categorical rule was not specifically raised below. But as this Court's decisions make clear, as long as a party advances a claim or a defense below, the party as a petitioner here may "make any argument in support of that claim [or defense]; parties are not limited to the precise arguments they made below." *Harris Trust and Savings Bank v. Salomon Smith Barney Inc.*, 120 S. Ct. 2180, 2187 n.2 (2000) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). There is no dispute that Johnson's First Amendment claim is predicated on this Court's decision in *Pickering*; nor is there any dispute that petitioners challenged in both lower courts the validity of Johnson's *Pickering* claim. Petitioners thus may press here the specific subsidiary argument that *Pickering* claims categorically fail when brought by high-level officials complaining about a policy dispute.

Nor is fact-finding needed to resolve the question presented. As Johnson's own complaint makes plain, he was the University's senior officer for personnel matters, reported directly to the President, and was in charge of implementing the University's affirmative action policies (App. 93a); and (by his account) he was discharged

because of his vociferous "battle" with the President concerning how best to implement those policies (App. 97a). The whole purpose of the *Branti*-like categorical rule is that, when a case involves a policy disagreement between an agency head and an immediate subordinate, it would be inappropriate to submit this high-level policy dispute to judicial fact-finding, and instead the First Amendment challenge is properly dismissed for failure to state a claim. *See, e.g., Hall v. Ford*, 856 F.2d 255, 263 (D.C. Cir. 1988) (affirming Rule 12(b)(6) dismissal because it is "self-evident" that "[h]igh-level officials must be permitted to accomplish their organizational objectives through key deputies who are loyal [and] cooperative").

Thus, the First Amendment question presented in the petition is a pure question of law and, as such, is ripe for resolution by this Court on the record in this case. The pros and cons of the *Branti*-like categorical rule have been well-ventilated by the many circuit opinions to have addressed this purely legal question. *See Hall*, 856 F.2d at 262-265; *Flynn*, 140 F.3d at 46-48; *Lewis*, 165 F.3d at 162-163; *Warzon*, 60 F.3d at 1237-1240; and other opinions cited in these cases. The choice between "wholesale" and "ad hoc" balancing is starkly posed, given the Sixth Circuit's decision to require "ad hoc" balancing here. Consequently, resolution of the sharp circuit split on this important First Amendment issue is appropriate at this time.

III. This Court should review the Sixth Circuit's holding that advocacy of affirmative action is, by itself, protected under Title VII.

A. The second question presented by the petition is whether Title VII protects advocacy of affirmative action, as the Court of appeals held. Johnson makes no effort to defend this ruling on its merits. Instead, he endeavors to oppose certiorari by arguing that his dispute with the University and its President

concerned not only his advocacy of increased efforts at affirmative action, but also what he perceived at the time to be discriminatory practices in violation of Title VII. *See* Opp. 2, 23. As the petition details (at 19-20 & n.16, n.17), however, Johnson made no such claim in his complaint or in his response to the University's motion for summary judgment; indeed, the district court specifically observed that Johnson never protested that any hiring decision by the University "was itself a violation of Title VII." (App. 73a).[4]

To the contrary, both the district court and the court of appeals specifically decided the question whether advocacy of affirmative action, by itself, is protected by Title VII (or Section 1981, which for this purpose is co-extensive with Title VII). Tellingly, both courts used identical words to describe the Title VII issue that Johnson put before them: "Specifically, Plaintiff alleges that Defendants discriminated against him because of his efforts to ensure that the University complied with its affirmative action policies [known as the A-900 process]." App. 15a (court of appeals), 70a (district court).

While the district court answered this question in the negative, App. 73a, the court of appeals (over Judge Kennedy's dissent) reached the opposite conclusion. App. 28a. Thus, far from being "theoretical" (Opp. 2), the Title VII question presented in the petition is precisely the question decided by both courts below, and presented by Johnson himself. Moreover, to the extent that the Sixth

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[4] In particular, Johnson made no mention of the President's alleged comment that he would refuse to consider hiring a black provost, upon which Johnson now places special emphasis. If Johnson had then viewed his case as involving opposition to "blatant discrimination," as he now claims (Opp. 2), this alleged incident would have been front and center. Yet it is altogether absent from Johnson's own description of the case, which instead told the district court that "[t]his case stems from Mr. Johnson's efforts to vindicate the University's official affirmative-action policies" (App. 106a-107a).

Circuit in deciding this question also muddled the distinction between what Title VII prohibits (discriminatory practices) and what it does not (lack of affirmative measures), review is warranted to clarify this distinction.[5]

As explained in the petition (at 21), and as Judge Kennedy argued in dissent (App. 50a), the Sixth Circuit's holding will have broad and unfortunate consequences. Indeed, in response to Judge Kennedy's dissent, the majority opinion acknowledges that, in its view, advocacy of an affirmative action plan is protected by Title VII "whether or not [that] plan [meets] the standard of *Croson*." App. 25a n.6. Thus, Johnson is incorrect in contending now that the Sixth Circuit's decision breaks no new legal ground (Opp. 27).

In addition to placing new and unwarranted restraints on employers, both public and private, the decision "creates a disincentive for employers," in the words of Judge Kennedy (App. 50), "to establish an affirmative action officer position" at all. Given the troubling implications of the Sixth Circuit's novel legal rule, and its divergence from the law in other circuits (*see* Pet. 21-22), this Court should review this issue concerning the extent of Title VII's proper scope.[6]

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[5] For example, the Sixth Circuit specifically mentions the University's decision not to advertise for a particular position (App. 35a). But Title VII does not require advertising, only non-discrimination, and thus Johnson's protest against this decision cannot count as opposition to a Title VII violation.

[6] Insofar as decisions of the D.C. and Seventh Circuit support the Sixth Circuit's interpretation of Title VII (*see* Opp. 24, 25 n.23), these cases widen the disagreement among the circuits on this problem of statutory interpretation, thereby increasing the need for this Court's review. Likewise, a recent Eleventh Circuit decision cutting the other way confirms that this problem is recurring and national in scope. *See Rice-Lamar v. City of Fort Lauderdale*, 2000 WL 1675595 (11th Cir. Nov. 8, 2000) (no Title VII, or First Amendment, violation when city dismisses affirmative action officer who insists on

B. This same justification for certiorari applies to the Sixth Circuit's holding that Johnson's decision to file an EEOC complaint was objectively reasonable. In sustaining Johnson's "participation" claim, the court ruled that Johnson "could have reasonably believed that he had a viable discrimination claim on the basis of his advocacy right as an affirmative action representative." App. 38a. The court's "participation" determination was thus predicated on its holding that advocacy for affirmative action is itself protected activity under Title VII. Accordingly, as explained in the petition (at 25), this aspect of the Sixth Circuit's decision creates the same inappropriate disincentives as the court's underlying Title VII holding. It should be reviewed as well. [7]

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implementing her own views of affirmative action, contrary to supervisors' directives).

[7] Although we see no need for the Court to review the content of Johnson's EEOC charge before deciding whether to grant certiorari on the Title VII issues raised in his complaint and decided by the courts below, should the Court wish to do so, we have lodged copies of this EEOC charge with the Clerk of this Court. (An examination of that document would reveal no Title VII violation that Johnson allegedly opposed, but only the unspecified claim that "the selection process could have been better" for hiring the new Chief Operating Officer of the University Hospital.)

CONCLUSION

For these reasons, and those in the petition itself, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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